THE WEN HO LEE MATTER

JOINT HEARING

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

AND THE

JUDICIARY COMMITTEE

OF THE

UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

THE WEN HO LEE MATTER

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JOINT HEARING ON THE WEN HO LEE CASE

TUESDAY, SEPTEMBER 26, 2000

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE
AND COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committees met, pursuant to notice, at 9:30 a.m., in Room SH–216, Hart Senate Office Building, the Honorable Richard C. Shelby, Chairman of the Select Committee on Intelligence, presiding.

Select Committee on Intelligence members present: Senators Shelby, Kyl, Bryan, Graham and Levin.

Committee on the Judiciary members present: Senators Hatch (Chairman), Thurmond, Grassley, Specter, Sessions, Leahy, Torricelli, and Schumer.

Also present: Senator Kerrey of Nebraska.

Chairman SHELBY. The Committee will come to order.

Today's hearing is the sixteenth in a series of hearings by the Senate Select Committee on Intelligence into security problems at the Department of Energy and the conduct and results of investigations into Chinese espionage against the nuclear weapons complex.

This morning's hearing, which may be followed by a closed session this afternoon, will focus on the investigation and prosecution of Dr. Wen Ho Lee for downloading and removing classified nuclear weapons secrets.

Congressional oversight of a counterintelligence investigation and the transition to a criminal prosecution falls within the jurisdiction of both the Senate Select Committee on Intelligence and the Senate Committee on the Judiciary. Today we welcome Chairman Hatch, Senator Leahy and our other colleagues from the Judiciary Committee. We have worked very closely on many issues of mutual concern, and we look forward to continuing that relationship today.

I have said on several occasions that I believe that our government's response to Chinese espionage against the U.S. nuclear weapons labs was mishandled in a number of respects. I believe that today.

I believe the original investigations into the loss of the W–88 information by the Department of Energy and the FBI failed to focus on the full range of potential sources. I believe the FBI's counterintelligence investigation was a gravely flawed exercise characterized by inadequate resources, lack of management attention, and missed opportunities.

I also believe that the Justice Department had sufficient information upon which to base a FISA application to the Foreign Intelligence Surveillance Court.

Because of these mistakes and missed opportunities, we may never know all the facts about when and how the PRC obtained classified nuclear weapons information.

I am also concerned about problems and issues that arose in the investigation and prosecution of Dr. Lee for the unlawful handling of Restricted Data and national defense information. Like many of my colleagues, and many Americans, I am concerned about the apparent imbalance between the serious charges against Dr. Lee and the leniency of the sentence agreed to in the plea agreement. I am aware, however, of the vital national security interests involved, and that there are times when a fully-justified prosecution must take a back seat to our nation's security.

I look forward to hearing from our witnesses today on how they sought to balance the interest of justice and the protection of our nation's security.

Amid the criticism of the Justice Department, the FBI and the Department of Energy, we must not lose sight of the facts. It is a fact that Dr. Wen Ho Lee downloaded and stole hundreds of megabytes of classified nuclear weapons information. He pled guilty to unlawful retention of national defense information.

Dr. Lee's actions seriously endangered our nation's security. The classified materials Lee downloaded included: nuclear weapons design source codes that model and simulate the complex physics of a thermonuclear explosion; input decks and input files describing the exact dimensions, geometry, and materials of our most modern nuclear devices; and data files containing the results of more than 50 years and hundreds of billions of dollars worth of hard-earned nuclear knowledge, including the results of more than 1,000 nuclear tests.

Dr. Paul Robinson, the Director of the Sandia National Laboratory, testified that the information Lee downloaded onto tapes "represents a portfolio of information that would allow one to develop a simple, easily-manufactured weapon such as a terrorist weapon all the way up to the very best that the United States is capable of designing."

Furthermore, while the government did not charge Dr. Lee with espionage, the fact remains that, as the U.S. intelligence community concluded, and I quote: "China obtained by espionage classified U.S. nuclear weapons information. This collection program allowed China to focus successfully down critical paths and avoid less promising approaches to nuclear weapons designs."

The information compromised included weapons design information, including data on the W–88 warhead, and information on "weapons design concepts and weaponization features," including data on the neutron bomb.

We do not know, and we may never know, the full extent of what China got. We can be fairly certain, however, that someone gave it to them.

Lastly, I would like to address a different issue.

While there are plenty of things to criticize, especially in the W–88 investigation, the fact is that a number of dedicated counter-

intelligence and law enforcement officers worked very hard on this case, and made a lot of difficult decisions. They certainly deserve better than the criticism they have received from the President, the very individual that sanctioned the prosecution.

The President's statement criticizing the conduct of the prosecution, as if it was conducted by an entity beyond his control, was bizarre to me, to say the least. The President knew exactly what was going on. His National Security Advisor was in the meeting where the principals of the law enforcement and national security communities made the decision to proceed with the prosecution. The President's statement basically made a mockery of the principles of chain of command, responsibility, and loyalty to subordinates.

Today we hope to explore, to the extent possible in an open hearing, the genesis of the case against Dr. Lee and its ultimate disposition in the form of a plea agreement.

I want to call on Chairman Hatch at this time.

Chairman HATCH. Mr. Chairman, thank you.

At the outset, on behalf of the Judiciary Committee I would like to thank Chairman Shelby and the Senate Select Committee on Intelligence, of which I am also a member, for their cooperation in conducting this joint hearing. I believe this is the most efficient way to examine the pertinent issues of interest to our respective Committees.

I understand that although we did not ask her to testify, the Attorney General is here and would like to, so we will be happy to take her testimony as well.

The topic of this hearing, oversight of the investigation and prosecution of Wen Ho Lee, is an extremely important one, one that raises serious questions concerning our criminal justice system and national security. The Judiciary Committee has done oversight of this case in the past, but refrained from conducting hearings near the time of the indictment out of deference to the ongoing investigation. Now that the disposition of the case has been resolved, it is appropriate to examine the decisions that were made in the case and the process that led to them.

While legitimate questions have been raised about the investigation and prosecution of this case, I do not want the significance of Dr. Lee's admitted wrongdoing to be underestimated. The mishandling of classified information is extremely serious business. I have heard no plausible explanations as to why such information was transferred from a classified computer system to an unclassified one, and then downloaded on portable tapes.

That being said, there has been substantial criticism of the way the government handled this case. It is essential that the public have confidence in our criminal justice system and the conduct of Federal prosecutors and law enforcement agencies. Accordingly, the American people deserve an explanation of the government's conduct in this case, and a response to the criticisms of the government expressed by Judge Parker at the plea hearing on September 13 and in various commentaries in the media.

In particular, the public should hear, one, why the government believed the indictment was justified. Was the case properly charged, and could the government prove all the elements of the alleged offenses or the charged offenses? Number two, was the plea

agreement an appropriate disposition of the case? Why does the government feel this represents a just result for the American people?

Number three, what were the conditions of Mr. Lee's pretrial confinement and were they appropriate? What explanation is there for the government's apparent reversal on the need for confinement such that it agreed to Lee's immediate release following his plea? And, four, was there improper targeting of Mr. Lee based upon the fact that he is ethnic Chinese?

I believe there are strong responses the government can make to each of these questions, but public confidence demands that those answers be heard and tested in a public forum.

The major response we have heard publicly to date is that the extreme sensitivity of the national security information at issue required that full explanation of the whereabouts of the missing tapes take precedence over the prosecution and punishment of Dr. Lee. The government has never waivered from its position that the information downloaded by Dr. Lee is of the utmost sensitivity, related to nuclear weapons technology.

In light of that strongly-held position, however, the government must explain certain actions which appear to be in tension with the paramount importance they have placed on the downloaded information.

Finally, I would note that Judge Parker, in his criticism at the plea hearing, specifically focused on the highest levels of the Executive branch agencies involved in this case. He also went out of his way to compliment some of the line attorneys representing the United States.

So there is no misunderstanding, my concerns and questions surrounding the handling of this particular case do not diminish my respect for the vast majority of dedicated career line prosecutors and agents who honorably represent the United States every day in courts across the country. It is their dedicated service which makes accountability at the top of the Executive branch so important, so that men and women on the front lines, along with the American people, have confidence that the political appointees in Washington are acting in an appropriate and apolitical manner.

Now I have to be on the floor of the Senate because of the h(1)(b) legislation, and I have asked Senator Specter to take my place until I return. I am very happy with my dear friend and Chairman of the Intelligence Committee. This ought to be a very interesting hearing today.

Thank you.

Chairman SHELBY. Senator Bryan.

Senator BRYAN. Thank you very much, Mr. Chairman.

This is a case in which there is very little, if any, good news to tell and plenty of blame to go around. The FBI, the Energy Department, and the Justice Department all share the responsibility for the poor handling of this matter from the beginning, dating back to the early 1980s. I look forward to hearing from our witnesses today, who will be able to explain the wisdom of the recent decision by the FBI and the Justice Department to enter into a plea bargain with Dr. Lee, and to assure the American people on two fronts—first, that this plea agreement will serve our national security by

resolving the nature and whereabouts of the missing nuclear data, and second, that the prosecution of Dr. Lee was not, as some have contended, a witch-hunt.

The Congress itself must accept some of the criticism, along with the Executive branch, for this unfortunate state of affairs. We cannot have it both ways. As one commentator recently put it, "Three months ago this case was said to illustrate the Administration's disregard for the American national security, not the railroading of a basically innocent man because of his race." This case, in my judgment, is neither of those things. And some blame attaches to the Congress for exerting pressure in such a way that both the protection of national security and basic civil liberties became the political footballs du jour.

Dr. Lee has pled guilty to one felony count of the 59 counts brought against him—the unlawful retention of national defense information. This is a serious charge, and it represents the conclusion of many years of concern within the government about the conduct of Dr. Lee. In fact, there have been legitimate and serious national security concerns about Dr. Lee's behavior, dating back for nearly 20 years.

His questionable conduct began not long after he began working at Los Alamos in 1978. In 1982 the FBI conducted a counterintelligence investigation of Dr. Lee that revealed, among other things, questionable contact between Dr. Lee and an espionage agent. When questioned by the FBI about this conduct and contact, Dr. Lee lied about contacting the individual. Indeed, he even denied knowing the individual. He admitted to the truth only after it became clear to him that the FBI had proof of the contact. And yet it took the FBI almost a year before confronting Dr. Lee with evidence of his contact with the espionage suspect.

This was just the first in what became a disturbing and troubling pattern of actions by Dr. Lee, and an equally disturbing and troubling inaction on the part of the FBI and the Department of Energy.

In 1988, Dr. Lee failed to report, as required, his activities during a visit to China where he gave a talk to the Chinese Institute of Applied Physics and Computational Mathematics. And in 1994, Dr. Lee failed to report a meeting with a senior foreign government nuclear weapons engineer, as required by the conditions of his employment.

There are additional concerns which have been raised that continue to remain classified, so I'm not able to discuss these at an open session. But this series of incidents, taken individually, and especially if looked at collectively, in my judgment could have justified revoking Dr. Lee's clearance years ago. If that had happened, none of us would be here today.

Dr. Lee's most recent activities that have become the subject of our hearing today and the 1999 indictment relate to the downloading from a secure to an unsecure computer the equivalent of approximately 400,000 pages of extremely sensitive nuclear weapons data.

The suggestion by some that is very troubling to me is that the information that Dr. Lee handled, alleged to be the crown jewels, is now viewed as unimportant and is easily available to the sci-

entific community in open channels. In my view, this is not the case. This information downloaded by Dr. Lee was indeed highly sensitive, and if it fell into the hands of foreign entities, it could place our country at grave risk of harm.

This downloading process was not the innocent collection of materials of interest to a scientist in his work. The process took many hours to accomplish over an extended period of time. The downloading activity required him to obtain entry to areas of the Los Alamos lab for which his access had been revoked. These materials were the classified property of the United States Government, and Dr. Lee must have known that they were not his for the taking.

Particularly alarming were the number of times Dr. Lee tried to enter the Los Alamos Lab's X Division, the most secure section of the lab, where nuclear weapons design takes place. This was after Dr. Lee had been told that his access to X Division and to both his secure and open X Division computer accounts had been suspended. Yet, in one instance he tried to enter the division at 3:31 a.m. on Christmas Eve. This is just one of 18 attempts over an approximately six-week period.

When prosecutors lined up this evidence, albeit circumstantial, a grand jury agreed that Dr. Lee should be indicted for his conduct. Now the government, as the result of a guilty plea by Dr. Lee, will be able to pursue vigorous debriefings of Dr. Lee with polygraph exams to determine exactly what he did with these 400,000 pages of highly sensitive United States Government nuclear weapons data.

And what is the nature of the nuclear weapons data downloaded by Dr. Lee? These materials have been described by top nuclear scientists at Los Alamos as a "chilling" compendium of nuclear weapons information that provide the capability someone could use to design and analyze nuclear weapons. One of Dr. Lee's Los Alamos colleagues testified that all the codes, all the data, all the input files, all the libraries, the whole thing is there, the whole ball of wax. Although some experts disagree, there is testimony from nuclear scientists that both fledgling and advanced nuclear states would benefit from the information Dr. Lee downloaded to augment their own nuclear capabilities and possibly to uncover vulnerabilities in the American nuclear arsenal that would help them defeat our weapons.

Now let me say a word or two about the investigation itself. It is almost a textbook example of how not to conduct an espionage case, a "Keystone Cops" investigation. The Lee investigation has been plagued by missteps from the very beginning. For example, it took, as I've indicated, the FBI almost a year before it confronted Dr. Lee in 1983 with the evidence that he had contacted an espionage suspect and lied about it. That alone may have been reason to consider revoking Dr. Lee's security clearance.

One of the most serious missteps concerns the government's attempt to search Dr. Lee's computer. It turns out that Dr. Lee, in April of 1995, signed two separate consent agreements granting permission for search of his computers. Accordingly, government investigators did not need a court order and could have entered his computer and discovered his computer downloads years earlier. Be-

cause of the still-classified nature of the investigation, I am prevented from discussing other very disturbing failures by the investigators.

The Attorney General has commissioned a detailed, objective report. It is the so-called "Bellows Report." In my judgment, it is an exhaustive report. And I think it is fair to say that this study is the best piece of work by the United States Government to come out of this sad tale, and it criticizes almost every aspect of the handling of this case.

The FBI investigation was plagued with problems that stemmed from its failure to give the case a sufficient priority. Suffice it to say that certain FBI and Department of Energy officials failed to properly carry out their responsibilities, and they should be held accountable.

Additionally, it turns out that the information regarding the W–88 warhead was not limited to Los Alamos, as this Committee and others were initially informed, but in fact had been disseminated to 546 offices throughout the government.

Accordingly, the initial list of suspects with access to the information could and should have been much longer.

And finally, I plan to explore this morning with our witnesses the issues relating to the conditions and circumstances of the confinement of Dr. Lee. Dr. Lee was charged with mishandling classified information, not espionage. Nevertheless, there were legitimate concerns by law enforcement that Dr. Lee could not have unmonitored contact with other prisoners or persons outside, to ensure that he did not pass information to the outside. Standard operating procedure in cases like this dictates a limitation on phone calls, mail and visitors and the monitoring of all such contacts.

However, Dr. Lee's treatment and confinement far exceeded legitimate measures designed to prevent the possible compromise of information, including, we are told, his shackling and a light in his cell 24 hours a day, even shackling when he was performing his authorized exercise each day. It is my understanding that Aldrich Ames, Edwin Pitts, Robert Kim, Jim Nicholson, all of whom pled guilty to espionage and are now serving long sentences in federal prison, were not subject to these types of extreme pre-trial prison conditions not specifically designed to limit or monitor outside contact. In fact, prisoners Pitts, Kim and Nicholson are said to have played cards together in jail.

I hope that the Attorney General and the FBI Director will be able to explain the conditions of Dr. Lee's confinement and why they were considered necessary. And even more troubling, I hope that they can allay the fears of the public that Dr. Lee's treatment in jail was imposed purposely in order to encourage him to enter a plea bargain. This is not the way our system of justice in this country works.

And again, Mr. Chairman, thank you for convening this hearing and I look forward to hearing from our distinguished panel of witnesses.

Chairman SHELBY. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman, and thank you for having this hearing.

Our focus this morning is whether mistakes were made in the prosecution of Wen Ho Lee and how to make sure that those mistakes were not repeated. I had understood that today was the day the prosecutors were going to sit down with Dr. Lee to start getting answers to, obviously, unanswered questions, but instead I understand that instead of being able to debrief as the plea agreement said, to debrief Dr. Lee, they've had to prepare for this hearing.

I am concerned that even by Washington standards this matter has spawned an unusual amount of finger-pointing and even grandstanding. But the matter calls on us to rely on our best instincts and engage in sober reflection and careful analysis. I recall, in connection with another matter in which this panel showed interest, that in July of this year former Senator John Danforth, distinguished Republican Senator, reported to this committee on the results of his independent investigation of the Justice Department's handling of the tragic raid on the Branch Davidian compound in Waco, Texas.

Now, there'd been years of finger-pointing and, I believe, grandstanding and even some hysterical allegations of governmental malfeasance, but Senator Danforth told the American people that the allegations were completely untrue and there was not even a close question. And last week, a federal judge in Texas reached the same conclusion in a civil lawsuit against the government in the Waco matter.

Now, the reason I mention this is that Senator Danforth said some things that apply not just to Waco, but to the Wen Ho Lee case—actually, a variety of other matters which have fallen into the crosshairs of Congress and into some of the independent counsels over the past few years.

Senator Danforth said, "We have totally overblown our willingness to just trash people." Senator Danforth said about those who make reckless claims of government misconduct and who grandstand on matters of public importance, "The wrong information was presented to the American people and it caused a real shaking of confidence of people in their government. When people make dark charges—I mean really, really serious charges—the people who make the charges should bear some kind of burden of proof before we all buy into them."

Now, with Senator Danforth's wisdom fresh in our mind, we turn to Wen Ho Lee. Some of the same people who a year ago questioned the Attorney General's fitness for office because she was too timid in her pursuit of Wen Ho Lee now question her fitness because she was too aggressive in pursuit of Wen Ho Lee. I have found her answers in these matters to be very concise and consistent and, Chairman Shelby and Vice Chairman Bryan, I am glad that you have invited her to be here to testify today.

Some of the same people who described Wen Ho Lee a year ago as one of the most nefarious spies in our history now claim that he's the victim of racial profiling. Most of these claims, the claims a year ago and the claims last week, have been made without all the facts. The person who knows the most critical facts, of course, is Wen Ho Lee. Today, the government was scheduled to meet with Dr. Lee in New Mexico and begin debriefing him and getting answers to very troubling questions which are important not just to

one criminal case in Albuquerque, but to the national security of the United States.

I take seriously what Senator Shelby and Senator Bryan have said about the sensitive nature of the nuclear material here. I've read some of the classified material and I share a concern. So therefore I'm very concerned that what we say and do here in Washington could adversely affect the success of that briefing. And thus I question whether the timing of this hearing and the tenor of some of the public comments over the past few weeks best serve our nation's interest and whether we should have waited at least till the debriefing was over and we had all the facts.

In fact, an important question for this hearing is whether the tenor of the congressional attention focused on this case over the past few years is part of the problem. Have we helped create the type of charged atmosphere about which Senator Danforth spoke? Did Congress' unforgiving scrutiny of the internal deliberations of the Justice Department in this and other cases and Congress' bringing of line-level prosecutors and agents into the glare of these television lights inhibit the free exchange of ideas within the Justice Department that all of us know is indispensable to decision-makers? Did we thereby affect their judgments and the free flow of debate within the department?

Now, it's easy to knock something down. It is more difficult to build something up solid, brick by brick, without fanfare. It's tedious, it's not as much fun. No one watches you. Nobody applauds. There are no headlines. But at the end of the day, you have something that will be done right and that will endure. Congressional oversight, when it is done right, is hard work. It is easier to spin out damaging theories and innuendo than to take the time to get the facts right and get them first. It is easier to engage in partisan finger-pointing and blame games than to exercise judgment about whether a particular official action was an honest mistake and to make suggestions for the future.

Too often, the Congress has taken the easy way out, scoring what it perceived to be political points. As the June, 1999 Rudman Report on the weapons labs states, "There have been many attempts to take the valuable coin of damaging new information and decrease its value by manufacturing its counterfeit—innuendo. Possible damage has been minted as probable disaster. Workaday delay and bureaucratic confusion have been cast as diabolical conspiracies. Enough is enough."

Now, one thing that we know, criminal espionage cases are not like other cases. Somebody robbed a bank, shoots a bank teller. Well, that person needs to be apprehended as quickly as possible and punished to the full extent of the law. But there are different interests at stake for someone like Dr. Lee, who acknowledged to have downloaded our nuclear secrets and, as Senator Bryan just said, serious secrets, onto cassette tapes small enough to fit in a box and be stashed or shipped somewhere. We may want to arrest him as quickly as possible.

But it may not be in our national interest to announce to a foreign power that he downloaded cassettes containing our country's nuclear secrets, and we're not sure where they are or whether they've been destroyed. We may want to punish Dr. Lee to the full

extent of the law, but it may not be in our national interest to put him in jail for years without knowing for sure what happened to those cassettes and why, for goodness sakes, they were made in the first place. If we don't determine what happened to our nuclear secrets, then we're not serving our national interest.

At a meeting of this committee on October 7, 1999, two months before Dr. Lee was indicted, and long before the government and Dr. Lee entered into a plea agreement, the distinguished Senator from Pennsylvania, Senator Specter, mentioned the possibility of immunizing Wen Ho Lee to get answers to our questions. Senator Specter correctly recognized that finding out what happened to our nuclear secrets is most important.

So I heed the advice of my former colleagues, Senators Danforth and Rudman. Before I buy into anything—and maybe this is a Vermont nature—I really like to know all the facts.

So I look forward today to hearing from the Attorney General and Director Freeh, and I thank the Committee for inviting them both, and the other witnesses, so we can work constructively, to learn from any mistakes in a way that makes us worthy of the confidence of the American people.

Chairman SHELBY. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I appreciate the opportunity to comment briefly about the perspective of the Subcommittee which has been conducting an extensive investigation on the Department of Justice oversight.

Senator Bryan has outlined some of the facts in the early investigation, supplemented by the investigation which showed substantial downloading by Dr. Lee in 1993 and 1994. We have pursued, to some extent, the issue of the failure of the Department of Justice to authorize the warrant for the issuance of the Foreign Intelligence Surveillance Act, which frankly hampered the investigation at a critical time. The analysis in the Bellows Report concluded that that FISA application should have been granted.

Then, for a protracted period of time—from August of 1997 until December of 1998—there was virtually no activity by the FBI. And then, on the eve of the publication of the Cox Report, suddenly the Department of Energy was activated, expressed concerns to the FBI about what the Cox Commission was going to do, polygraphs were undertaken and then, in effect, the book was thrown at Dr. Lee in what appeared to be a response to failures in the Department of Energy and the Department of Justice.

The Department of Justice then knew of very extensive downloading when they had access to records in April of 1999, but no action was taken to secure information about that downloading until after the indictment was brought. What the Department of Justice has done here, and the Department of Energy, is obviously an important facet for congressional oversight.

Now, the other side of the coin is what was done to Dr. Lee. The manacles, the references to the Rosenbergs, the false testimony given by the FBI raise a possible inference—and I say only possible—that these were pressures to compel a guilty plea. Those are very serious questions which have to be answered by the witnesses today—why Dr. Lee was placed in leg irons, in wrist chains and had his wrists bound to his waist. What purpose did that serve?

When the government now contends that they have entered into this plea bargain to protect classified information and to find out what happened to the classified information which was downloaded, there's a serious question, which was posed by Judge Parker, who laid it out flatly in his opinion on September 13th: "Before the Executive branch obtained your indictment," referring to Dr. Lee, "on the 59 charges last December, your attorney, Mr. Holscher, made a written offer to the Office of the United States Attorney to have you explain the missing tapes under polygraph examination."

So that if the answers to what happened to the downloaded tapes were so critical, why didn't the government take up the offer at a much earlier stage? And I know there are contentions about differences, but we're going to scrutinize that very carefully.

Then, with respect to the disclosure of information under the Classified Information Protection Act, CIPA, the government had proposed a substitution so they did not have to disclose confidential information the judge had not ruled on. Judge Parker had not ruled on it.

And there were appellate remedies.

The release of Dr. Lee may have—the imminent release of Dr. Lee may have been a really telling factor, perhaps the most dominant factor, in why the government accepted the plea bargain. And that's something we're going to pursue, as we will pursue the issue of racial profiling.

The defense made a prima facie showing, leading the judge to order the disclosure of very substantial documents, and on September 13th the judge commented that he regretted not having access to those documents, which were to be produced on September 15th. So those should be available for oversight by the Congress.

This is obviously a very, very important matter to the United States on its national security interests, and it's obviously a very important matter on the constitutional rights of an American citizen. And there's going to have to be very extensive oversight to get answers to these very important questions.

Thank you, Mr. Chairman.

Chairman SHELBY. I'd like to make one administrative announcement. There's been an objection to this Committee meeting past 11:30, so we're going to dispense with the rest of the opening statements, so we can get to the witnesses. Everyone's opening statement will be made part of the record in its entirety.

I want to announce our witnesses that are with us: Attorney General Janet Reno, U.S. Attorney Norman Bay, Deputy Secretary of Energy T.J. Glauthier, and FBI Director Louis Freeh.

Attorney General Reno, you proceed as you wish.

Senator THURMOND. Mr. Chairman.

Chairman SHELBY. Senator Thurmond.

Senator THURMOND. Since we're running late, in order to save time, I ask unanimous consent that my statement be put in the record.

Chairman SHELBY. Without objection. I made that announcement. I'll reiterate it.

[The prepared statements of Senators Thurmond, Grassley, and Schumer follow:]

PREPARED STATEMENT OF SENATOR CHARLES SCHUMER

Mr. Chairman, the case of Wen Ho Lee is obviously a troubling one. And it is tempting, particularly when the public is clamoring with questions about whether justice was done or denied, for members of Congress to dive in, to start criticizing, pointing fingers, and laying blame.

I certainly have a lot of questions about the case—in particular the justifications for the conditions of Dr. Lee's pre-trial confinement and the justifications for the charges in the indictment.

But today I would like to suggest a different course of action. Let us request that the Attorney General order an independent outside investigation, and let us immediately cease all further hearings until that inquiry is complete.

Yes, we will have to hold off on excoriating those we think are at fault, and yes we will have to submit to a process that will be significantly slower than running ahead with multiple hearings by multiple committees. But only an investigation outside of the Department of Justice and outside of Congress will restore the public's damaged faith in our justice system that has resulted from the handling of this case.

Both the Attorney General and Director Freeh have ordered internal inquiries of this matter. However, in order to put this case to rest, the fact-finder must not be susceptible to a charge of institutional or political bias. His or her credibility is of paramount importance.

The Attorney General's appointment of Senator Danforth last year as Special Counsel to examine issues surrounding the Waco siege serves as a useful model. That inquiry led to a resolution of the public's questions regarding Waco which has lingered for years despite internal investigation and countless congressional hearings. Similarly, the appointment of a Special Counsel in this case seems the surest route to a creditable and complete analysis of the troubling questions the public legitimately has with the way the Department and the FBI conducted the case.

If a Special Counsel is appointed, Congress should immediately cease all further hearings until the outside inquiry is complete. Let's face it, prior to the indictment of Dr. Lee, there was significant congressional outcry that he should be immediately prosecuted for stealing information so sensitive that it could put the world's security at risk.

One Senator called this "the biggest security breach of our lifetime." Another compared the case to the Rosenbergs. Yet another said we may have lost "every major nuclear secret in the United States." Senators on both sides of the aisle called for the Attorney General's resignation for not prosecuting Dr. Lee.

In light of Congress' role in pressuring for the prosecution of Dr. Lee, Congress should await the outcome of an outside investigation before proceeding further with any oversight hearings.

Only an outside investigation, not partisan wrangling and finger-pointing will give the American public—and especially the Asian-American community—confidence that this case is being reviewed in a wise and fair manner.

Let me be clear. I am in no way implying that the Department of Justice has necessarily acted improperly—the purpose of the inquiry would be to determine that based on the facts. Nor am I saying that Congress does not have legitimate oversight authority to examine, for example, whether the conditions of Dr. Lee's detainment were improper and whether the crimes charged were appropriate. But, at this time, what the public deserves is an outside inquiry independent of both the pressures within the Department and the sometimes partisan rancor of Congress.

PREPARED STATEMENT OF THE HONORABLE STROM THURMOND, U.S. SENATOR FROM SOUTH CAROLINA

Mr. Chairman, I am pleased that we are holding this joint hearing to review the Justice Department's handling of the Wen Ho Lee case.

It cannot be disputed that the Lee case represents a serious mishandling of information about America's nuclear secrets. Dr. Lee illegally downloaded vast quantities of classified information onto portable computer tapes and an unsecure computer. There was no work-related reason for him to create his own personal library of nuclear source codes, representing over 400,000 pages of documents. He began deleting it after he realized he was under investigation.

Last year the government brought a 59–count indictment and vigorously opposed bail. Yet, nine months later, the government dropped all charges but one and agreed for Dr. Lee to be released for time served. Now he is home with almost no restrictions, and the debriefing as to exactly what he did with the critical computer tapes has not even begun.

It appears that the government's case essentially fell apart, and there is no clear answer as to why. Dr. Lee has not been vindicated by the plea bargain, but he clearly received a slap on the wrist compared to the punishment that he faced if the government's case had been successful.

It is unfortunate that the President is doing all he can to avoid responsibility. In the words of a Washington Post editorial, he "asks us to see him as one more commentator troubled by the case, rather than the head of the government that brought it." If the President was troubled, he should not have waited until weeks after the case was over to express those concerns to his Attorney General.

The truth is that the Clinton-Gore Administration has not done nearly enough to protect America's national security secrets. The Lee case is just one example. The problem extends throughout the Department of Energy and far beyond Los Alamos. Just a few months ago at an Armed Services Committee hearing, I expressed my grave concerns about a potentially significant breach of security in my home state at the Savannah River facility.

I hope the next Administration will make keeping our national security secrets safe a top priority from day one. For now, we must explore what went so wrong with the Lee case. I am pleased that the government is here today to address this serious issue.

PREPARED STATEMENT OF THE HONORABLE CHARLES E. GRASSLEY, U.S. SENATOR FROM IOWA

Mr. Chairman, I'd like to express a few concerns about this case. First and foremost is my concern that a citizen of this country would endanger national security information as recklessly as Mr. Lee did. He did so in a job which he was entrusted by the taxpayers to protect. And I applaud the diligence with which the government pursued Mr. Lee to mitigate the risks to the nation's security. That includes the work of the Justice Department and the FBI.

Having said that, I'd like to point out where I believe this case went astray. From the beginning, this was a case about managing mistakes. There wasn't one government agency involved in this case that didn't mess up—from day one to this day!

The case began as a who-done-it: Who disclosed the W–88 warhead? Mr. Lee was the chief suspect. But the FBI/DOE investigation was flawed from the start. Not only was Mr. Lee singled out in a flawed investigation as the culprit, but it's not even certain that the W–88 was even compromised. He was perhaps the target of a "non-crime." The FBI is still working on discovering who the "perhaps non-criminal" is. They've been working on the case for two years.

Meanwhile, the FBI continued to go after Mr. Lee on another issue—the mishandling of information. This is a decidedly different—and lesser—offense than Mr. Lee had originally been investigated for. The problem is, the hype associated with the earlier investigation followed Mr. Lee into the subsequent investigation. This was, in part, thanks to (1) congressional pressure, and (2) the FBI's fear that, if it didn't do its job, it would look bad.

It is, therefore, a matter of proportion. The FBI and DOJ oversold the case and the transgressions committed by Mr. Lee. Those who were too close to the case—mainly DOJ and the FBI—continued the hype, and incurred the wrath of the judge. And for good reason! For instance, one FBI agent gave misleading testimony. This was a haunting refrain from my investigation into misconduct in the FBI crime lab. Included in our findings was the fact that FBI agents would mislead the jury in criminal cases, and get away with it.

As the Wen Ho Lee case went forward, the Justice Department was busy plugging holes in the dike. Meanwhile, those of us watching from afar were watching the wheels falling off the case. No less than three investigators on this investigation—working for my subcommittee—predicted as long ago as December that Wen Ho Lee would be let go with time served, and nothing more. That prediction was made because the government's case was so weak against Mr. Lee with respect to proportionality.

I think it's important to note that at today's hearing we're hearing just one side of the story—the government's side. The attorneys for the defense have declined to testify until after Mr. Lee is debriefed by the government later this week. The judge in the case, Judge Parker, also declined to be interviewed by the committee. My point is, the public needs to reserve judgment on this case until the full story comes out. Today's testimony is not the whole picture.

Thank you, Mr. Chairman.

[The prepared statement of Attorney General Reno and Director Freeh follows:]

PREPARED JOINT STATEMENT OF THE HONORABLE JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, AND THE HONORABLE LOUIS J. FREEH, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Good morning, Chairman Hatch, Chairman Shelby, Senator Leahy, Senator Bryan and members of the Committees. We thank you for the opportunity to appear today to discuss the investigation and prosecution of Dr. Wen Ho Lee.

At the outset, we want to express our appreciation to the Committees for the manner in which you have conducted your important oversight. This case has raised extraordinarily sensitive national security issues, and you have consistently worked with us to ensure that these issues are addressed thoughtfully and responsibly. In particular, we would like to thank Senators Hatch and Specter for delaying scheduled hearings last year on the Wen Ho Lee case. It was a difficult decision, but that postponement was in the national interest.

Frankly, we have serious concerns about testifying here today. Not because we are reluctant to answer your questions. To the contrary, we remain convinced that we made the right decisions, for the right reasons, at the right time. Our concerns arise instead out of fear that we may say something in this room, or that subsequent communications will be made to Dr. Lee's attorneys, that will impair our ability to find out what happened to the missing tapes, why they were originally made by Dr. Lee, why subsequent copies were made, and with whom, if anyone, those tapes, or the data on them, were shared. Our goal is to provide you and the American people as much information as possible, without impairing our ability to get answers to these vital questions. We hope that you agree that every other consideration pales in comparison to our ability to achieve these objectives. We begin by emphasizing that Dr. Wen Ho Lee has been convicted of a very serious crime. He stood before a federal court judge, admitted his wrongdoing, and pleaded guilty to a felony. Contrary to some reports, there is nothing minor or insignificant about that crime. Dr. Lee was entrusted with our nation's most sensitive nuclear weapons design and testing secrets, and he has publicly admitted violating that trust in a highly dangerous way.

As you know, Dr. Lee worked for the X Division at Los Alamos National Laboratory. The X Division is responsible for the research, design and development of thermonuclear weapons, and requires the highest level of security of any division at Los Alamos. Dr. Lee pleaded guilty to illegally transferring Secret Restricted Data from the classified computer system within X Division, and then downloading this information onto a portable computer tape, at a location that he knew was unsecure.

"Restricted Data" refers to information relating to the design, manufacture or utilization of atomic weapons that has not been authorized for release by the Department of Energy. The Restricted Data that Dr. Lee downloaded onto ten portable computer tapes included the electronic blueprints of the exact dimensions and geometry of this nation's nuclear weapons.

The crime to which Dr. Lee pleaded guilty was part of a much larger series of related crimes that were charged in the grand jury's indictment. While some have now questioned our decision to charge all of those related crimes in the indictment, let us say as emphatically and as forcefully as possible—the Department of Justice and the FBI stand by each and every one of the 59 counts in the indictment of Dr. Lee. Each of those counts could be proven in December 1999, and each of them could be proven today. The facts of this case have not changed, although as we explain below, recent rulings by the trial court posed serious obstacles to proving those facts without revealing nuclear secrets in open court.

But while the facts of the case had not changed, there was one key change that made this plea possible: Dr. Lee's willingness finally to come forward, to admit his criminal conduct, and to agree to cooperate. This is the result we had sought from Dr. Lee from before the indictment was returned.

It is critical to understand that Dr. Lee's conduct was not inadvertent, it was not careless, and it was not innocent. Over a period of years, Dr. Lee used an elaborate scheme to move the equivalent of 400,000 pages of extremely sensitive nuclear weapons files from a secure part of the Los Alamos computer system to an unclassified, unsecure part of the system, which could be accessed from outside of Los Alamos—indeed, from anywhere in the world. Dr. Lee then downloaded those files onto portable computer tapes and still later made additional copies of some or all of those tapes. In order to achieve his ends, Dr. Lee had to override default mechanisms that were designed to prevent any accidental or inadvertent movement of those files. His downloading process consumed nearly 40 hours over 70 different days.

Nor was this all. Dr. Lee carefully and methodically removed classification markings from documents; he attempted repeatedly to enter secure areas of Los Alamos after his access had been revoked—including one attempt at 3:30 a.m. on Christmas Eve; and he deleted files in an attempt to cover his tracks before he was caught.

Dr. Lee created his own secret, portable, personal electronic library of this nation's nuclear weapons secrets. At the very least, in doing so, he placed these secrets at extraordinary risk. And make no mistake about the scope of this offense, and the danger it presents to our nation's security. As an expert from Los Alamos testified in this case, the material downloaded and copied by Dr. Lee represented the complete nuclear weapons design capability of Los Alamos at that time—approximately 50 years of nuclear weapons development, at the expense of hundreds of billions of dollars. Quoting from Dr. Younger's testimony: "These codes and their associated data bases, and the input file, combined with someone that knew how to use them, could, in my opinion, in the wrong hands, change the global strategic balance. They enable the possessor to design the only objects that could result in the military defeat of America's conventional forces. The only threat, for example, to our carrier battle groups. They represent the gravest possible security risk to the United States, what the President and most other Presidents have described as the supreme national interest of the United States, the supreme national interest."

Before Dr. Lee created these tapes, only two sites in the world held this complete design portfolio: the secure computer inside the highest security division at Los Alamos and the secure computer system inside the highest-security division of another of our national laboratories.

Recently there has been substantial publicity suggesting that this information may not be as sensitive or classified as the government first represented. Prior to the decision to seek an indictment of Dr. Lee, there was considerable discussion among DOE, DOJ, and the FBI concerning the sensitivity, significance and classification of the information Dr. Lee had placed on the missing tapes. At the time, DOJ and FBI were informed by DOE that this was significant and sensitive nuclear weapon design and testing information that was classified at the Secret Restricted Data level. In fact, there was a final meeting at the National Security Council precisely on this point, in order to ensure that in pursuing a prosecution we would not put this sensitive information at further risk. The sensitivity, significance, and classification of this information has not changed. The current assessment of the classification and sensitivity of the design and testing information is the same as it was when the meeting with the leadership of government occurred at the National Security Council.

Many have recently asked, "If Dr. Lee's conduct was so bad, why did the government negotiate a plea agreement and agree to release him?" That is an understandable question, but it has a simple answer. The Department of Justice and the FBI concluded that this guilty plea, coupled with Lee's agreement to submit to questioning under oath and to a polygraph, was our best opportunity to protect the national security by finding out what happened to the seven missing tapes, as well as to the additional copies of the tapes that Dr. Lee has now admitted to having made. This is not to say that it was an easy call. This was an extraordinarily difficult decision to make. However, it is important to keep in mind that this is not an ordinary criminal matter. It never was. This is a national security matter of paramount importance. At least seven—and possibly 14 or more—tapes containing vast amounts of our nation's nuclear secrets remain unaccounted for. This is not rhetoric; it is a simple, frightening fact.

From the moment we learned last year that our nation's nuclear secrets were on missing portable tapes, we have had a central goal in this matter: to find out what happened to the tapes. This was not just an FBI goal, or a Department of Justice goal, or a Department of Energy goal—it was the goal of the entire national security leadership of our government. But, in pursuing that goal, we were always mindful of the need to protect constitutional rights.

Before any charges were brought against Dr. Lee, this matter was analyzed by the highest levels of our government. Working together, we carefully considered the substantial risks to our national security of proceeding with a public prosecution of Dr. Lee, counterbalanced against the risks of foregoing such a prosecution.

The decision to prosecute Dr. Lee was made only after repeated attempts to gain his cooperation before indictment. The Government repeatedly told Dr. Lee and his attorneys that, in order to avoid indictment, Dr. Lee would have to provide a full and credible explanation—an explanation we could verify—establishing the complete chain of custody of the tapes from the moment he created them. Those efforts repeatedly failed because Dr. Lee attempted to impose unacceptable conditions upon his cooperation. Thus, it is not true, as some have suggested, that the Government could have had the same plea prior to indictment it has obtained now. To the con-

trary, the decision to prosecute was reached only after we had concluded that there was no realistic hope of obtaining a reasonable and credible cooperation agreement—one that would provide the investigative means of determining exactly why Dr. Lee did what he did.

Once the charges against Dr. Lee had been brought, it was still our hope that we could reach a cooperation agreement. Serious discussions about a possible plea agreement began during the late summer, when Judge Parker—immediately after taking over the case—strongly encouraged the parties to engage in mediation and enlisted Senior Judge Leavy as a mediator. Although mediation is most unusual in a criminal case, the government entered into the discussions in good faith, and worked hard to reach an acceptable solution. After difficult negotiations, the prosecutors handling the case consulted Washington and presented possible plea offers. Ultimately a consensus was achieved within the Department of Justice and a plea agreement was reached. We—the Attorney General and the Director of the FBI—are in total agreement on this decision.

It bears repeating that the government made this agreement for one overarching reason: to find out what happened to the missing tapes. There were other factors that figured in the determination of whether a plea agreement at this time made sense, and we do not intend to gloss over them. They included the following:

First, as noted above, Judge Parker had, upon taking over the case, strongly suggested that this case was an appropriate one for mediation. In and of itself, this was a signal that the new trial judge viewed this case in a far different manner than his predecessor.

Second, and even more critically, Judge Parker then ruled in favor of the defendant in initial proceedings under the Classified Information Procedures Act. It appeared from this ruling that defendant would succeed in his attempt at graymail. Although the prosecutors were still litigating those CIPA issues, the Judge's reasoning left little room to expect that the Government would prevail. The court's ruling would have exposed extremely sensitive nuclear weapons information during a public trial, crossing an exposure threshold we had already determined posed an unacceptable risk. We note, in this regard, that while Judge Parker's ruling was a significant factor in our decision whether to enter into the plea agreement, that ruling in no way undermined our view that we were right to bring this indictment in the first place. Indeed, proceedings under CIPA, which can be held only after indictment and before trial, are the only means for the Government to determine precisely how much sensitive information it will have to reveal publicly at trial, and whether such disclosure would create an unacceptable risk.

Third, Judge Parker had ruled after the August detention hearing that Dr. Lee should be released from his pretrial confinement. While this ruling was stayed by the 10th Circuit Court of Appeals, which was scheduled to hear the bail matter de novo, we faced the very real prospect that Dr. Lee would soon be released in any event, under conditions that we had pointed out to the Court were inadequate to prevent Dr. Lee's communications with others. Thus, those who question how the Government could argue that Dr. Lee should be confined pretrial one day, and agree to his release the next, misunderstand the situation as it existed immediately before the plea: the Government's arguments against release already had been rejected by the trial court.

Fourth, as Judge Parker's August detention hearing also made clear, the trial threatened to become a "battle of the experts." Indeed, notwithstanding that defendant's experts conceded that they had not actually reviewed the tapes—and notwithstanding the weaknesses in their positions that were explored in the closed portion of the hearing—the Court still gave weight to their testimony. Furthermore, it was clear from the Court's rulings that it would have been necessary to disclose still more classified information at trial in order to disprove defense claims that the material in issue—which again, they had not reviewed—was already in the public domain.

Fifth, the loss of the NEST hard drives at LANL, and the ensuing investigation, posed the possibility of further damage to the Government's case, since it might have suggested that LANL security was lax—even though in fact there was no comparability or connection between the two matters.

Finally, the FBI's lead case agent had had to correct erroneous testimony from the initial detention hearing. The agent acknowledged that he had misstated what one of Dr. Lee's colleagues had told the FBI about Dr. Lee's explanation of the purpose for which he wanted to use that colleague's computer. The agent also volunteered that he overstated certain evidence relating to whether Dr. Lee had sent letters to find employment outside Los Alamos—although there is in fact other evidence that shows that Dr. Lee did send such letters, as the agent originally had testified. With regard to the agent's first misstatement, while the agent stated that he

had made an honest mistake as he tried to make the point that Dr. Lee had not disclosed that his true purpose was to download classified nuclear weapons data onto portable tapes, this was a serious matter. It prompted detailed reviews of his testimony by the Agent's supervisors and the U.S. Attorney's Office. While we do not believe this error significantly undercut the overall evidence against Dr. Lee, it did affect the agent's credibility and thereby damaged the prosecution. His supervisor believed that. The prosecutors believed that. And those of us in Washington faced with the difficult decision whether to enter into the plea believed it as well. Probably more damaging, it created an unmistakable public perception that the government's case against Dr. Lee was "crumbling." That perception was erroneous then and we believe it remains erroneous now. Nonetheless, it was a factor that we had no choice but to consider.

Yet the decision to enter into the plea agreement was still a difficult one, for despite these setbacks, the case against Dr. Lee remained strong. It should be pointed out that while there were many charges in the indictment because of Dr. Lee's many acts of improper conduct, all of the charges flowed from a common scheme: the improper transfer and downloading of the classified Restricted Data. Long before he was ever charged, Dr. Lee through his attorneys, after initially denying the existence of the tapes, admitted that he had made the improper transfers; he was simply denying that he had the required criminal intent when he did it. Under the circumstances, notwithstanding Judge Parker's adverse rulings and the other problems, we remained confident about the prospects for conviction on all counts of the indictment—assuming, of course, that CIPA considerations did not make it impossible to go to trial.

Even a conviction on each and every count, however, would not have guaranteed the cooperation of Dr. Lee. Dr. Lee's truthful and full cooperation was the one thing the government most needed to protect the national security of the United States.

Our paramount concern remained the same: would this plea agreement assist us in finding out what happened to the missing tapes? In the end, we—the Attorney General and the Director of the FBI—agreed that accepting the plea agreement was the correct national security decision. As we stated earlier, the unique national security interests of this case outweigh the criminal prosecution interests.

As you already know from press accounts, the plea agreement was jeopardized near the end of the negotiations. As you may recall, the plea proceeding was rescheduled at the last moment and the parties went back to their negotiations with the assistance of the mediator judge. This delay has been the subject of considerable speculation in the media. In fact, the delay rests with Dr. Lee, who made a startling revelation just before the plea proceeding was supposed to begin. For the very first time, Dr. Lee revealed that he had made copies of the tapes he had illegally created. This was an enormously significant development. What it meant was that instead of seven missing tapes, there could be 14 or more.

As you know, the plea agreement calls for Dr. Lee's complete and truthful cooperation. We are hopeful that he will now be completely truthful and forthcoming. The plea agreement—which requires Dr. Lee's sworn testimony, and requires him to submit to a polygraph—gives him powerful incentives to be completely truthful. If he is not, the plea agreement provides that he may be prosecuted. It should be noted, as well, that Dr. Lee must continue to respond to the Government's inquiries for up to a year; and he cannot travel outside the country during that time period without the permission of the Mediator Judge.

Before turning to a detailed description of the evidence and unclassified information about this case, we want to discuss two additional matters that have received considerable attention in the press: the conditions of Dr. Lee's confinement and the allegations relating to selective prosecution or racial profiling.

With respect to Dr. Lee's incarceration, the government properly moved for pretrial detention under the applicable federal statutes. After a three-day hearing in which several witnesses testified at length about the extraordinary danger presented by the missing tapes, Judge Parker appropriately concluded that Dr. Lee should be held in jail pending his trial. A three judge panel of the Tenth Circuit Court of Appeals upheld that ruling.

The Department of Justice, the Department of Energy, and the FBI also believed strongly that Dr. Lee had to be restricted from freely communicating with outsiders during the period of his pretrial detention, given the uncertain location of the missing tapes. Following a request from the United States Attorney and Secretary Richardson—a request the FBI fully supported—the Attorney General authorized certain Special Administrative Measures to be imposed upon Dr. Lee. These Special Administrative Measures were requested for one reason and one reason only: to restrict Dr. Lee's ability to pass information through intermediaries that could have the devastating consequence of disseminating the nuclear secrets he had stolen from Los

Alamos. Whether the tapes were missing for five years or missing for one day, they were still missing and unaccounted for, an unacceptable national security risk. This was not an idle fear by the government. As set forth below, Dr. Lee has in this very case been shown to tamper with or destroy evidence after being told he was under investigation.

More generally, we would like to emphasize that we sought to be responsive to complaints brought to our attention by Dr. Lee's attorneys concerning the conditions of his confinement. For example, we arranged for a Mandarin language-speaking FBI agent to be present, so that Dr. Lee could speak to his family in that language. Similarly, we made special food arrangements for Dr. Lee, arranged for exercise on weekends, and built, at significant government expense, a special secure facility in the courthouse where he could consult with his lawyers—and where, in fact, he spent up to six hours per day on over 90 days of his incarceration. In numerous respects, then, Dr. Lee was treated better than others who were also held in administrative segregation at this facility.

And let me clear up some misconceptions: Dr. Lee was held in solitary while in the facility, but—as I have just noted—in fact he spent a good part of over 90 days outside the facility, with his lawyers. He was not shackled in his cell, but only when he was transported or was otherwise outside his cell—as were others in similar circumstances. As to the claim that a light was kept on in his cell, we would like to point out that this claim first surfaced, so far as we are aware, after the plea. To the best of our knowledge, no complaint was made to us by Dr. Lee's lawyers about the lighting conditions in his cell. Significantly, we informed Dr. Lee's attorneys that we would respond to any reasonable requests regarding the conditions of his confinement—and that is precisely what we did.

We would like to move now to the disturbing allegations that the government engaged in selective prosecution or racial profiling in the investigation and prosecution of Dr. Lee. There is simply no truth to these allegations. Dr. Lee was not investigated because he is an American of Asian descent, he was not indicted because he is an American of Asian descent, and he was not incarcerated because he is an American of Asian descent.

As the Attorney General and the Director of the FBI, we are honored to head organizations that pride themselves on fair and impartial law enforcement. We would never tolerate racial profiling or selective prosecution, and we are committed to equal justice under the law. Dr. Lee was investigated and prosecuted based on his actions, not his race; and he has been convicted based solely on those actions. We will turn to those facts next.

FBI COUNTERINTELLIGENCE INVESTIGATIONS OF WEN HO LEE

Dr. Lee has been known to the FBI since 1982. At the time, he worked in Los Alamos in X Division. His name surfaced when he contacted a suspected agent of a foreign power who was the subject of an ongoing FBI counterintelligence investigation. He offered to help that person identify who had brought him to the attention of the authorities. When Dr. Lee was first confronted by the FBI in November, 1983, he denied having contacted the individual. In fact, he denied even knowing the person. Only after Dr. Lee learned that the FBI had indisputable proof that the contact took place did he finally admit it. After providing an explanation of the reasons for the contact, he agreed to cooperate with the FBI regarding the individual being investigated for passing classified information. After he provided limited cooperation, the FBI ultimately closed that first inquiry into Dr. Lee because nothing else developed.

A decade later, in 1994, Dr. Lee again came under investigation because of his actions. Dr. Lee met with a senior foreign government nuclear weapons designer who was part of an officially approved delegation visiting the United States. The circumstances of the encounter clearly indicated that they knew one another, even though Dr. Lee had never reported meeting this weapons designer on prior trips abroad, as he was required by the conditions of his employment to do. As in the 1982 case, Dr. Lee did not reveal his relationship with this individual. Classified information about the details of this encounter which further heightened our investigative interest in Dr. Lee have previously been provided to the Committees.

The FBI's investigation into this 1994 matter was still ongoing when Dr. Lee emerged as a potential subject in the 1996 Administrative Inquiry by the Department of Energy (DOE) into the possible compromise of information related to the W–88 nuclear warhead. Being aware of the potential interest in Dr. Lee, and not wanting to take any steps that would interfere with that inquiry or expose the FBI's interest in Dr. Lee, FBI Headquarters and FBI Albuquerque agreed to hold the in-

vestigation of the 1994 incident in abeyance. Ultimately it was closed in favor of the larger W–88 investigation that began to be focused on Dr. Lee.

On May 26, 1996, DOE's Administrative Inquiry identified possible potential candidates for the leak but concluded that "Wen Ho Lee appears to have opportunity, means and motivation" to have compromised the W–88 information. The FBI opened an investigation of Dr. Lee in May 1996 based on this predicate. Clearly, the FBI should have conducted an additional, independent investigation to verify what was reflected in the Administrative Inquiry. The same should have been done to eliminate other suspects and to validate the conclusion that Dr. Lee was the most likely individual to have compromised the W–88 information. Nevertheless, when his name surfaced in the DOE investigation, Dr. Lee already had a history with the FBI. He already had demonstrated his willingness to lie to the government about his contacts with a suspected espionage subject in 1982 and to not report the relationship Dr. Lee had with a high-ranking foreign official that became known in 1994. He also had twice traveled abroad to meet nuclear scientists. Given those circumstances, the FBI began an investigation of the person who DOE concluded to be the most probable candidate for the W–88 leak. Additional classified information has been provided to the Committees about this episode.

As of December 1998, the FBI had not been able to verify that Dr. Lee was responsible for the possible compromise of the W–88 information. However, in subsequent months the investigation led to the discovery of the secret nuclear weapons information that Dr. Lee had been accumulating over a period of years from Los Alamos, as explained in greater detail below, in the section dealing with the criminal investigation.

After opening the investigation into Dr. Lee's possible involvement in the W–88 matter, the FBI sought to develop sufficient indicia of probable cause for a warrant under the Foreign Intelligence Surveillance Act (FISA) to conduct surveillance of Dr. Lee. The initial FISA application was submitted in 1997 but was not presented to the Court. The Department of Justice and the FBI had a good faith disagreement as to whether the application alleged sufficient probable cause to support a FISA warrant. The FBI's subsequent efforts to enhance probable cause, which admittedly could and should have been more aggressive, were ultimately unsuccessful. Additional classified information about this portion of the investigation has been provided to the Committees.

In March 1998, Dr. Lee traveled to Taiwan. In later investigation it was determined he consulted with the Los Alamos computer "Help Desk" to determine if he could access the secure Los Alamos computer system from overseas. He was told he could not.

In December 1998, Dr. Lee again traveled to Taiwan for three weeks. He returned on December 21, 1998. DOE, which oversees Los Alamos, conducted a polygraph examination of Dr. Lee with the concurrence of the FBI on December 23, 1998. To avoid alerting Dr. Lee of the FBI's interest in him, DOE characterized the examination as a standard, post-travel polygraph, combined with his five-year reinvestigation for security clearance purposes.

The DOE polygraph examination, done by a contract polygrapher, focused on whether Dr. Lee had any unauthorized contacts or shared any classified information with unauthorized persons. During the polygraph, Dr. Lee admitted for the first time that he had been approached in 1988 by PRC nuclear weapons scientists, one of whom became the head of the PRC nuclear weapons development program, in an effort to obtain classified information about U.S. nuclear weapons. At the conclusion of the DOE contract polygraph on December 23, 1998, FBI agents on the scene were told that Dr. Lee had passed the examination. This was an opinion that FBI and polygraph experts from another agency later concluded was mistaken.

Immediately after the December 23 polygraph, based on admissions by Dr. Lee about unreported contacts that he had had during foreign travel, Los Alamos officials informed him that for the next 30 days his access to the section of X Division where he worked would be denied. He was instructed to report to unsecure space in T Division. Dr. Lee's section within X Division was one of the most secure portions of Los Alamos and a location where research into nuclear weapons design takes place. Despite being informed that his access was removed, and that he could no longer enter X Division space without an escort, Dr. Lee improperly attempted, without success, to enter his section within X Division five different times on the evening of December 23, 1998. He then tried again on Christmas Eve, December 24, 1998, at 3:30 in the morning. In addition to those six attempted entries, Dr. Lee made 12 other attempts to enter X Division between Christmas Eve, 1998 and February 10, 1999. All such attempts were improper.

Records also indicate that when Dr. Lee officially reported to T Division on January 4, 1999, after the Christmas holiday, he sought assistance from the Los Alamos

computer "Help Desk" to revive his X Division secure computing privileges. In making this request, Dr. Lee did not disclose that DOE officials had removed his access to the Division X server. Being unaware that Dr. Lee's access to Division X's server had been blocked for security reasons, the computer Help Desk reactivated his account. Once he regained access to his account, Dr. Lee deleted files from his X Division server.

In the meantime, after being informed on December 23, 1998 that Dr. Lee had passed the DOE polygraph, the Albuquerque Division of the FBI arranged an interview of Dr. Lee in preparation for closing out the pending FBI investigation of him on the W–88 matter. The FBI conducted this interview on January 17, 1999. Throughout the four-hour interview, Dr. Lee sought to appear cooperative and forthcoming. He provided new and additional details about contacts he had with foreign scientists, one of whom was related to information causing the FBI's 1994 investigation. Dr. Lee denied any involvement with the loss of the W–88 information. On January 21, 1999, at the request of the FBI, Dr. Lee signed, under oath, a statement that memorialized this interview. At that point, Albuquerque FBI, believing that Dr. Lee had passed the polygraph and was cooperating, advised FBI Headquarters that it had serious doubts that Dr. Lee was the appropriate suspect in the W–88 investigation. Consideration was given to closing the case.

The FBI had requested and later received from DOE copies of the charts from Dr. Lee's polygraph examination of December 23, 1998. These were submitted to FBI Headquarters for review by the polygraph experts who do quality control for the FBI. The Polygraph Unit at FBI Headquarters did not receive the copies until January 28, 1999, because the FBI did not aggressively pursue receipt of the charts from DOE. After completing the internal review of the polygraph results on February 2, 1999, the FBI polygraphers who conducted a "blind" review concluded that Dr. Lee's response to the question whether he had ever committed espionage against the United States was at best inconclusive. Review by experts at another agency of government reached a similar conclusion. The FBI shared the FBI results with DOE immediately.

As a result of this development, Dr. Lee was asked to submit to a polygraph administered by the FBI. On February 10, 1999, the FBI conducted a polygraph examination of Dr. Lee, after advising him of his rights. During this examination, the FBI asked Dr. Lee whether he had provided "these two sensitive [nuclear weapon] codes" to any unauthorized person and whether he had deliberately obtained any W–88 documents. The examiner found Dr. Lee's responses to be inconclusive. After discussion between the examiner and Dr. Lee about exactly what was being asked, the examiner rephrased the questions by asking Dr. Lee: "Have you ever given any of those two codes to an unauthorized person?" Answer: "No." "Have you ever provided W–88 information to any unauthorized person?" Answer: "No." The polygraph examiner concluded that Dr. Lee's responses to these two questions were deceptive. In a post-polygraph interview, Dr. Lee admitted helping nuclear weapons scientists from the People's Republic of China to solve a mathematical problem that they had previously been unable to solve. Dr. Lee conceded that the solution he had provided could easily be used in developing nuclear weapons, but he stated that he had not given up any classified information.

On March 5, 1999, the FBI interviewed Dr. Lee again. During this interview, he consented to a search of his X Division and T Division offices at Los Alamos. On March 7, 1999, the FBI questioned Dr. Lee one last time in an attempt to secure information about his involvement in the compromise of the W–88 information. Unfortunately, by that time, the investigation concerning Dr. Lee had been leaked to the press. This effectively eliminated any possibility of the normal, structured counterintelligence interview by specifically trained agents fitting for this circumstance. The interview was rushed, an inappropriate level of aggressiveness was applied, and the interview was unsuccessful. Dr. Lee did not admit or discuss what is now known to have happened. He gave no indication of having made any tapes or having done anything improper or illegal.

One approach that was taken during that interview was not consistent with the conduct expected of agents during an interview. Specifically, Dr. Lee was reminded of the fate of Julius and Ethel Rosenberg, who were executed for espionage. Confrontational interviews often call for tough statements by investigators, but that implication was inappropriate. Again, Dr. Lee ended the interview without providing any useful information and without giving any indication of the actions to which he has now pled guilty. Meanwhile, however, the search of Dr. Lee's office at Los Alamos was underway. That search disclosed evidence that led eventually to his indictment.

The search of Dr. Lee's X Division office produced a notebook containing a one-page, computer-generated document that listed all of the files on a directory that Dr. Lee had created within the computer Common File System (CFS) at Los Alamos. An X Division physicist examined this list of files (given the name "kf1" by Dr. Lee) and determined that the files listed in Dr. Lee's "kf1" directory were contained in the open or unclassified part of the CFS. The physicist then confirmed that the file descriptions appeared to refer to highly classified information concerning thermonuclear weapons design and testing—information that under no circumstances should have been in an unclassified directory.

This discovery caused Los Alamos scientists to search the X Division portion of the Common File System. The physicist who reviewed the list found in Dr. Lee's notebook logged on to the system and tried to access the files listed in Dr. Lee's "kf1" directory. He discovered that the majority of the files had recently been deleted. Examination of all of Dr. Lee's directories showed that Dr. Lee had deleted more than 360 files and two complete directories between January 20, 1999 (three days after being interviewed by the FBI) and February 10, 1999 (the day he was polygraphed by the FBI). The Government was able to determine that the deleted files contained highly classified nuclear weapons data.

As an indication of Dr. Lee's criminal intent, and his awareness of the classified nature of the files, the following circumstances, among others, are relevant:

Dr. Lee started improperly manipulating and moving the files in question from the classified to the unclassified system in 1993. He did not begin to delete those files until January 20, 1999. They remained on the unclassified system for as long as six years before Dr. Lee began deleting them. The deletions started three days after the FBI's January 17 interview.

In addition, two days after the deletions began, Dr. Lee contacted the "Help Desk" at Los Alamos and asked for help in deleting files. Specifically, he was concerned that despite his best deletion efforts, the files were "not going away." The help desk explained to Dr. Lee that this was a safeguard built into the system in case a file was accidentally deleted. This safeguard ensured that a backup copy of the deleted file remained in the system for a period of days. Dr. Lee inquired whether there was a way to delete these backup copies, and after being instructed how to do so, he deleted the backup files that had been automatically created by the system as a result of his deleting the original files.

On February 1, 1999, Dr. Lee again contacted the Help Desk for assistance because he was connecting to the Los Alamos computer system from home but he kept getting disconnected.

Finally, Dr. Lee deleted files again on February 10, 1999, the day he failed the FBI polygraph examination. On that day, Dr. Lee deleted 310 of the 470 files that he had improperly moved from the classified to the unclassified system after being informed he failed the polygraph and admitting that he had been approached by scientists at night in his hotel room and had helped nuclear weapons scientists from the People's Republic of China.

After discovering the list of files and their apparent deletion from the system, Los Alamos officials immediately undertook the highly time-intensive process of recovering Dr. Lee's deleted "kf1" files from the archival portion of the Common File System. By the end of March 1999, experts at Los Alamos had retrieved the entire contents of the "kf1" files and confirmed that Dr. Lee had indeed moved highly sensitive nuclear weapons information from the classified to the unclassified side of the Los Alamos computer system. As exhaustive computer forensic efforts later established, effecting these transfers required numerous deliberate steps. There was no accidental or inadvertent method for completing the transfers.

First, as with any authorized Los Alamos user, Dr. Lee was required to log onto the computer system with his password and his "Z" number. For audit purposes, the system was designed to provide an audit trail that was traceable to the user's unique Z number. According to Los Alamos officials, the tracking capabilities of the computing system were not widely known.

The computing environment at Los Alamos in 1993 and 1994 consisted of four partitions, two of which are relevant to the charges against Dr. Lee: the Open (green) partition and the Secure (red) partition. The Open partition allowed only unclassified computing, and users were not required to have any type of security clearance. The Secure partition allowed both classified and unclassified computing, but only by personnel with Q-clearances, which, of course, Dr. Lee had. Q-clearance is a security clearance required to access classified nuclear weapons data. It is the highest security level at Los Alamos.

The Common File System (CFS) spanned the partitions and operated as a hierarchical system. That is, it allowed work to be performed at lower classification levels in higher security partitions but not the reverse. In order to lower the classification marking of a file, the file had to be down-partitioned and saved as a new file to CFS at the lower classification level. The computer used to down-partition a file was called "Machine C."

Because of the expanded computing power of the Secure partition, it was not uncommon for an X Division scientist to up-partition unclassified material from the Open to the Secure partition; after computing was completed in the Secure partition, the scientist could then legitimately down-partition the unclassified material back to the Open partition. This was the purpose of Machine C.

As previously mentioned, Dr. Lee was assigned a unique "Z" number that allowed him access to the Secure partition and to Machine C, which was used for down-partitioning. By tracing this Z number, the precise steps Dr. Lee took could be recreated, through forensic analysis.

After logging onto the Secure (red) partition, Dr. Lee would identify the classified material he desired, then save it in a secure directory by physically typing into the keyboard "SAVE" and then typing "CL=U," which means "classification level equals unclassified." By making these deliberate keystrokes, Dr. Lee was able to move material to the unclassified level, even though the material itself was actually classified. He would then use Machine C to down-partition the material from the secure partition to an open partition. Dr. Lee would then save the material to an open (green) directory. The material, which of course remained classified, was then available in electronic form in the open side of the computer and, therefore, could be accessed by any machine connected to the Internet. The material was available from any computer in the world, to any user who had or has Dr. Lee's Z number and password or through hacker intrusions. It was also available for copying onto portable media such as magnetic tapes.

As charged in the indictment, each of the 19 files he down-partitioned were "TAR" files, meaning each was a collection of many smaller files. The audit system tracked not only the movement of the files but the content of the files as well. Two X Division scientists, fully familiar with the material, confirmed that the files transferred to the open system contained the highly sensitive information about the most critical and powerful weapons of the U.S. nuclear arsenal.

The search of Dr. Lee's office also revealed three multi-page documents that did not bear classification markings, as required by regulation, despite the fact that those documents contained classified information. Subsequent forensic investigation revealed that the classification stamps or marks had been removed in several ways: (1) in one, the classified stamp had been covered up while the document had been copied on a copying machine; (2) in another, the classification markings had been physically cut from the top and bottom of each page; and (3) in the third, the classification marking had been deleted by computer command before the document was printed. According to Los Alamos officials, there is no bona fide work-related employment purpose in deleting classification designations or markings from a classified document. In fact, such deletions would constitute a violation of Los Alamos security regulations.

On April 10, 1999, shortly after these discoveries were made, the FBI executed a court-ordered search warrant at Dr. Lee's residence. During the search, agents found a three-ring notebook that indexed 13 portable computer tapes designated by Dr. Lee as Tapes A through M. Dr. Lee's index for Tapes A through M includes a file name and the size in bytes of each file. This index provided independent corroboration that the files Dr. Lee improperly down-partitioned onto the Open side of the computer at Los Alamos were the very same files that he downloaded onto Tapes A through M. The notebook in his residence also contained detailed, step-by-step, keystroke-by-keystroke instructions for downloading the Restricted Data files found in Dr. Lee's "kf1" directory onto the tapes.

Dr. Lee also had a handwritten notation in Chinese in his notebook that there was a Tape N which was the only copy of those particular files and that the files were not in his "kf1" directory. Tapes A through M were created in 1993 and 1994. Tape N was created in 1997 and contained the most up-to-date data on nuclear testing—data that would have greatly enhanced the usefulness of the 1993 and 1994 data. Through painstaking computer forensic and investigative work, the FBI was able to discern the origins of Tape N.

In 1997, when Tape N was downloaded by Dr. Lee, the policy at Los Alamos had changed to allow users to attach tape drives directly to a secure system. During Dr. Lee's earlier downloading in 1993 and 1994, tape drives were not available to individual scientists, and downloading could take place only with the assistance of an X Division computer specialist. By attaching a tape drive in 1997, Dr. Lee did not

need to down-partition files and place them on the open system in order to make them available for downloading onto tapes. Instead, in 1997, he could download directly from the secure partition to the tape.

But, as noted above, Dr. Lee had to take more elaborate steps to create Tapes A through M in 1993 and 1994, since he did not then have a tape drive on his own X Division computer. Instead, he went outside of X Division to a computer of another Los Alamos employee in another Division. That employee taught Dr. Lee how to log onto the employee's computer and make tapes by downloading files onto the tape drive. Dr. Lee also obtained that employee's access number. Significantly, because he was outside X Division, this employee's computer could not access the Secure (red) partition. But, again as noted above, Dr. Lee already had defeated that security precaution by using his X Division computer to move the files to the Open (green) partition. He then could download the files onto the tapes from a computer outside X Division—precisely as he did.

CLASSIFICATION LEVEL OF THE DOWNLOADED MATERIAL

"Restricted Data" is statutorily defined in Title 42, United States Code, Section 2014(y) to include all data, not previously released by DOE, concerning (1) the design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. Restricted Data is classified at three levels: Top Secret (known as TSRD), Secret (known as SRD) or Confidential (CRD).

The evidence indicates that Dr. Lee downloaded files relating to the design, construction and testing of nuclear weapons, including:

Input deck/input file information that includes electronic blueprints of the exact dimensions and geometry of this nation's nuclear weapons, beginning with early atomic weapons and up to and including our most sophisticated modern warheads;

Data files, including: nuclear bomb testing protocol libraries reflecting the data collected from actual tests of nuclear weapons; data concerning nuclear bomb test problems, yield calculations, and other nuclear weapons design and detonation information; and information relating to the physical and radioactive properties of materials used to construct nuclear weapons; and

Source codes used for determining by simulation the validity of nuclear weapons designs and for comparing bomb test results with predicted results; and computer programs necessary to run the design and testing files.

All of this information was classified at the SRD or CRD level and we now know that Dr. Lee downloaded this information to computer tapes. Some of the downloaded and copied codes were the same codes in two formats. One format is designed to run on Cray supercomputers. The other format is designed to run on non-supercomputers.

During the search of Dr. Lee's office in the T Division, the FBI recovered, among other tapes, three tapes that later were determined to contain classified information. Two of the tapes still had intact classified data remaining on them. The third of these three tapes appeared at first to contain only unclassified data. But subsequent forensic review of that tape revealed that Dr. Lee had "reconfigured" the tape in February 1999, after he learned he was the subject of an FBI espionage investigation. In reconfiguring the tape, Dr. Lee uploaded the tape onto a computer, deleted three classified files while keeping the unclassified data, and then downloaded the unclassified data back to the tape. He then returned it to the shelf in his T Division office. Dr. Lee accomplished the reconfiguration by approaching one of his new T Division colleagues and telling him that he needed to use the colleague's computer tape drive in order to conduct some unclassified work that he had stored on tape; but, as noted above, computer forensics shows that he actually uploaded all of the files from the tape onto the T Division server, deleted the classified files only, and then downloaded the remaining unclassified files back onto the tape.

For the reasons stated above, Dr. Lee could not have inadvertently moved classified information to the unclassified side without knowing that the information was, in fact, classified. When Dr. Lee realized that he was the subject of an FBI investigation, he deleted exactly those downloaded files that were problematic for him. And, again, the classified files he deleted had remained on that open computer for more than five years before he took extraordinary measures to delete them.

As we enter the debriefing process, we are cognizant of the pattern that has repeated itself during the past 18 years. Beginning in 1982, Dr. Lee's initial response to investigators' questions was a staunch denial of any wrongdoing, followed by admissions when confronted with incontrovertible proof. Not until after his February 1999 polygraph did he admit to the scope of his assistance to nuclear scientists from the People's Republic of China. Similarly, through his counsel in this case, Dr. Lee

initially denied creating any tapes of the downloaded information. When confronted with forensic proof, he conceded that he made tapes but maintained that the information on them was unclassified. Now, of course, we have evidence to prove that the information on the tapes was classified. Finally, of course, Dr. Lee has now at last admitted that he made copies of at least some of the tapes he created.

THE INDICTMENT

Based on the evidence described above, the government was prepared to prove each of the 59 charges in the indictment of Dr. Lee. The government was prepared to establish beyond a reasonable doubt that:

Dr. Lee tampered and altered Restricted Data each and every time he removed the security classifications from the files listed in the indictment, a step he took in order to move those files to an Open system;

When he moved those files to an Open system, he was appropriating the data for his own use;

Dr. Lee maintained possession and dominion over the files, at least until January and February 1999, when he deleted them from the system.

In so doing, Dr. Lee acquired the data with intent to injure the United States.

The FBI uncovered no direct evidence that Dr. Lee passed classified information to a foreign government. The circumstantial evidence, however, that Dr. Lee collected the files with the intent to injure the United States or to advantage a foreign nation, includes:

X Division physicists were prepared to testify that the Secret Restricted Data contained in the files and downloaded tapes represent the most sensitive information collectively possessed within the X Division at Los Alamos. Dr. Lee knowingly and willfully placed America's most sophisticated information regarding the design and construction of nuclear weapons on an open computer system and then copied this information onto portable tapes that are still missing and alleged to have been destroyed.

It was not a simple task for Dr. Lee to move files from the closed to the open system. The CFS tracking system reveals that Dr. Lee spent hours unsuccessfully trying to move classified files into unclassified space. Dr. Lee eventually worked his way around what was designed to be a cumbersome process. Dr. Lee had to command the computer to "declassify" the files when he was well aware that the files contained some of the most sensitive classified information at Los Alamos.

Dr. Lee spent many hours assembling the files that he wanted to download. Those files contain entire sets of certain classified information that scientists at Los Alamos would testify are rarely used in their entirety because of their size. Dr. Lee's colleagues were prepared to testify that there was no legitimate work-related reason to assemble the files in the manner Dr. Lee did, much less move it to an open directory. In addition, Dr. Lee was not directly working on a significant amount of the data he collected. His colleagues would have testified that Dr. Lee had little involvement and no direct work-related reason to use the information he assembled.

X Division scientists most familiar with the downloaded information would have testified that Dr. Lee took every significant piece of information to which a nuclear weapon designer would want access.

Dr. Lee downloaded this data onto portable tapes, and then also made copies of at least some of those tapes. According to X Division scientists, the information was designed to run on secure Los Alamos computers. There is no legitimate work-related reason for creating tapes of this information. The creation of the tapes further evidences an intent on the part of Dr. Lee to remove the information from the sole control of the United States Government.

Dr. Lee worked secretly to create the original nine tapes containing classified data in the 1993–94 time period. He made those tapes using a colleague's unsecure computer, as well as the colleague's password, without any legitimate, work-related purpose.

Dr. Lee's deletion of X Division Secret Restricted Data files (including the backup copies) that he had moved from the closed to the open system at a time when the FBI alerted him to their investigation and his failed polygraph, compellingly demonstrates his consciousness of guilt.

The evidence also indicated that Dr. Lee had sought employment overseas during this same time period.

CONCLUSION

The key pieces of evidence in this case—including the file list found in Dr. Lee's office, the classified files themselves that Dr. Lee had deleted from his computer and the detailed outline found in his notebook at his residence—once analyzed, ex-

plained and understood in context, establish that Dr. Lee willfully jeopardized the nation's most valuable nuclear secrets. He did so first by removing them from the secure, classified side of the Los Alamos computer system, thereby positioning the files to be electronically transmitted anywhere in the world. And he did so again by physically downloading the files onto tapes, in an unsecure location. Finally, of course, he has now admitted to copying at least some of those tapes.

What he did with those tapes has been, from the moment of discovery, of paramount concern to the government and explains the government's decision to enter into plea negotiations with Dr. Lee. Although we remain convinced that a successful prosecution of Dr. Lee on all 59 counts could have been brought, barring CIPA obstacles, we are equally convinced that a plea agreement provides the best available opportunity to gain the information needed to assess the full extent of the damage done to the national security by Dr. Lee.

This point is driven home by the fact that despite the government's interview of over 1,000 witnesses and review of 20,000 pages of documents in English and Chinese, and the forensic examination of more than one thousand gigabytes containing more than one million computer files, we only recently discovered a very critical piece of information from the defendant himself: the fact that, in addition to the downloaded tapes described in the indictment, Dr. Lee, through his counsel, advised the government that he made copies of at least some of the tapes in question. We learned this fact only as a result of the plea negotiation. Otherwise, we in all likelihood would never have known.

In sum, this has not been an easy case for the Government, for the Court, or for this Country. We welcome and value your oversight, even when it identifies our own shortcomings, because it can bring with it constructive criticism and new solutions. But in exercising this legitimate and valuable oversight function, these Committees should not lose sight of the fundamental point here: the responsibility for this situation rests exclusively with Wen Ho Lee, whose deliberate, unjustifiable, criminal actions put this Country, and the world, at great risk.

STATEMENT OF THE HONORABLE JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General RENO. Chairman Shelby and members of the Senate Judiciary and Intelligence Committees, Director Freeh and I appreciate the opportunity to appear before you today to tell you what we did in the case of Dr. Wen Ho Lee and why we did it.

At the outset, I must caution that we're limited in what we can discuss here. The government has secured a commitment from Dr. Lee to cooperate and to submit to a comprehensive debriefing in the next few weeks and further inquiries for some months after that. We do not—and I am sure you do not—want to do or say anything here that would interfere with the debriefing.

Some issues may also require that we go into closed session. And Chairman Shelby, I appreciate that you have made provision for a closed hearing later today to do just that.

As Attorney General and as the Director of the FBI, Director Freeh and I share together an awesome responsibility to protect the national security of this nation but at the same time to protect the Constitution and the rights of all Americans.

These cases are difficult. Without full access to the facts, and given some of the rumors and speculations that have been reported in the press, I can understand that questions arise. But I hope that by the end of our session today, you will agree that our actions made sense, were reasonable, and were correct.

Dr. Lee is no hero. He is not an absent-minded professor. He is a felon. He committed a very serious, calculated crime, and he pled guilty to it. He abused the trust of the American people by putting at risk some of our core national security secrets.

He had one of the highest security clearance levels possible, granting him access to the most sensitive of nuclear weapons infor-

mation. He had worked at Los Alamos National Laboratory for 20 years. He had access to the Los Alamos computer system that was designed precisely to be secure against unauthorized intrusions.

What was on that secure system—nuclear weapon design and testing data that is, in effect, the library of blueprints of most of the United States' nuclear weapons designs, designs that are the fruit of an investment of hundreds of billions of dollars.

Dr. Lee systematically, deliberately, moved nuclear weapons data that was not even related to the work he was doing.

He moved it from the system where it was safe and secure to a vulnerable computer in the Los Alamos system that any hacker or foreign government could penetrate. Dr. Lee did so by betraying the trust that had been placed in him to protect those secrets.

The process of transferring this data took Dr. Lee a long time, nearly 40 hours over a 70-day period. As has been pointed out, it involved the equivalent of 400,000 pages. Stacked up, that's a 13-story building. He left this information that is so vital to our national security on that unsecure computer not for hours or days or even months; he left it there for years. He knew that it was classified. He knew that what he was doing was wrong. He moved files in such a way as to defeat security measures he knew were in place.

He went further. He copied the information from the unsecure computer onto 10 portable tapes. Three were recovered by the FBI; seven are missing. What's more, he made copies of the portable tapes, and those copies are also missing.

When Dr. Lee found out he was being investigated, he took steps to cover up his actions. After his access was revoked to the part of the lab where the secure computer resided, he tried over and over again to get in, including at 3:30 a.m. on one Christmas Eve.

Despite what you read in the papers, until he entered the plea agreement, Dr. Lee never had said he would admit his wrongdoing, plead guilty to a felony and tell us what he did with the tapes. The plea agreement entered into by the government with Dr. Lee is our best chance to find out what happened to the computer tapes containing some of the nation's most important nuclear designs and testing information. That is why our debriefing of Dr. Lee is our first order of business.

Now, Dr. Lee has a powerful incentive to tell us what happened to the tapes and to do so truthfully. The plea agreement requires that he submit to questioning under oath and through a polygraph. It requires that he respond to the government's inquiries for a year thereafter. And during that year, he cannot leave the United States without permission from the mediator judge. If he does not tell the truth or if he breaches the plea agreement, he can be prosecuted.

The FBI and the staff of Los Alamos National Laboratory did excellent forensic work in this case. Their computer forensics found out what Dr. Lee did and what steps he took to avoid detection. Without that high-caliber and complicated investigative work, we would not even have known that Dr. Lee had illegally taken the files, because he was so careful to hide his actions. I commend all involved in this excellent computer forensic work. Without that work, we would not be in the position we are today to take steps to protect these secrets to the extent that it is possible now.

One of the things I want to assure the American people—and as you pointed out, Senator Bryan, I asked for a review of this matter. Perhaps we can address that later in closed session. But I think that report dealing with how Dr. Lee came to our attention indicates quite clearly that there was no effort on anybody's part to target him because of his race.

Finally, I would like to talk about why we charged Dr. Lee as we did. Criticism of the Department for allowing Dr. Lee to plead to only one of 59 counts has been made. But each of these counts was very serious. They involved charges involving four statutes. The 59 counts represent a separate violation of federal law based on the downloading of each of 19 separate computer files and on a the separate downloading and onto each of the 10 tapes. Allowing a defendant to plead to one charge at the end of the day in a situation like this would not be uncommon.

In our joint written statement, we explain why Dr. Lee was charged, why he was detained, why he reached a plea agreement. Director Freeh will give that statement, but it represents the views of both of us. We believe that it is important that the public understand these questions.

We want to do everything we can, as I have previously announced, to make sure that we take steps to make available to you and to the American public all the information possible under the law and consistent with national security, so that people will understand what actions were taken, why they were taken, and so that they can have confidence in the process.

I thank you for the opportunity to appear.

Chairman SHELBY. Mr. Bay.

STATEMENT OF NORMAN C. BAY, U.S. ATTORNEY, DISTRICT OF NEW MEXICO

Mr. BAY. Thank you.

Chairman SHELBY. Will you bring your mike up closer to you?

Mr. BAY. I'm sorry.

Chairman SHELBY. That's okay.

Mr. BAY. Good morning, Chairman Shelby, Senator Leahy, Senator Bryan, and members of the Committee. Thank you for inviting me to appear today to discuss the investigation and prosecution of Dr. Wen Ho Lee. This is my first appearance before these Committees, so I would first like to take a moment to introduce myself to you.

As you may know, on September 8th, 2000, the United States Senate confirmed me as United States Attorney for the District of New Mexico. In particular, I would like to thank Senator Jeff Bingaman and Senator Pete Domenici, who supported my nomination. I would also like to thank the Senate Judiciary Committee for approving my nomination as United States Attorney, as well as members of the United States Senate for voting to confirm my nomination. It was a great honor, indeed, for a career federal prosecutor, who also happens to be the son of immigrants.

My one regret is that this great honor was not one that my parents were alive to see. I can't tell you much about myself without telling you just a little bit about my parents. I owe them so much. My parents left China after World War II and came to the United

States in search of freedom and in search of a better life. They got married here and raised a family with eight children. I have three brothers and four sisters. They loved this country and they became naturalized citizens.

My father worked for the United States Air Force, and like many immigrants, my parents stressed the value of education. They were convinced that it was the way for us to get ahead in the United States. All eight of their kids have college degrees, and in addition, we collectively hold three Masters degrees, two PhDs, two MBAs, a JD and an MD. It's kind of an alphabet soup of degrees.

In 1972, my family moved to Albuquerque, New Mexico. My dad was working at Kirtland Air Force Base. In 1978, I graduated from high school in New Mexico, and then I went to Dartmouth College, where I was a junior year Phi Beta Kappa and graduated summa cum laude in 1982. I then went to Harvard Law School, where I graduated with honors cum laude, and was on the Board of Student Advisers.

Since law school, for the past 14 years, I have spent my life in public service. It has been a rewarding life that has given me a chance to help make a difference. From 1986 to 1987, I clerked for the Honorable Otto R. Skopel Jr. of the United States Court of Appeals for the Ninth Circuit in Portland, Oregon. From 1987 to 1989, I was an attorney adviser at the Office of Legal Adviser at the State Department in Washington, D.C. In 1989, Jay Stephens, then the United States Attorney in the District of Columbia, hired me as an assistant United States Attorney. So began my career as a federal prosecutor, a job I have always been proud to have.

In 1995 I returned to New Mexico for family reasons. I became an assistant United States Attorney in the Violent Crimes Section in the Office in New Mexico. In 1997, I became supervisor of the Violent Crimes Section. I have received an award from the Justice Department, and an award from the Treasury Department, and I've also been an instructor at the National Advocacy Center in Columbia, South Carolina, where I've taught trial advocacy and juvenile prosecutions. On March 8, 2000, I was appointed interim United States Attorney for the District of New Mexico, and was confirmed on September 8th, 2000.

I thank you, Mr. Chairman, once again for inviting me to appear before your Committees.

Chairman SHELBY. Director Freeh.

STATEMENT OF THE HONORABLE LOUIS J. FREEH, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Director FREEH. Thank you very much, Chairman Shelby and members of both Committees. I would like to, if I could, for a few moments talk about the facts. And I ask for the Committees' indulgence in advance, but I can't imagine how we can proceed, given the issues at hand and the questions, without having the facts.

I want to begin by emphasizing what has already been said here, and that is that Dr. Lee has been convicted of a very serious crime. He stood before a federal court judge, admitted his wrongdoing, and pleaded guilty to a felony. He was entrusted with our nation's most sensitive nuclear weapons design and testing secrets, and he

has publicly admitted violating that trust in an extraordinarily dangerous way.

As you know, he worked for the X Division at Los Alamos National Laboratory. This division is responsible for the research, design, and development of thermonuclear weapons and requires the highest level of security of any division at Los Alamos. Dr. Lee pleaded guilty to illegally transferring secret restricted data from the classified computer system within X Division and then downloading this information onto a portable computer tape at a location that he knew was unsecure.

"Restricted data" refers to information relating to the design, manufacture, or utilization of atomic weapons that has not been authorized for release by the Department of Energy. The restricted data that Dr. Lee downloaded onto 10 portable computer tapes included the electronic blueprints of the exact dimensions and geometry of this nation's nuclear weapons.

The crime to which he pleaded guilty was part of a larger series of related crimes that were charged in the indictment. Each of those 59 counts could be proven in December 1999, and each of them could be proven today. The facts of this case have not changed, although, as we explain below, recent rulings by the trial court pose serious obstacles to proving those facts without revealing nuclear secrets in open court.

But while the facts of the case had not changed, there was one key that made this plea possible—Dr. Lee's willingness, finally, to come forward, to admit his criminal conduct, and, most importantly, to agree to cooperate. This is the result we had sought from Dr. Lee from well before the indictment was returned.

It is critical to understand that Dr. Lee's conduct was not inadvertent, it was not careless, it was not innocent. Over a period of years, he used an elaborate scheme to move the equivalent, as you've heard today twice, 400,000 pages of extremely sensitive nuclear weapons files from a secure part of the computer system to an unclassified, unsecure part of the system, which could be accessed, by the way, from anywhere outside of Los Alamos, even over the Internet.

Dr. Lee then downloaded those files onto portable computer tapes and still later, as we most recently heard, made additional copies of some or all of those tapes. In order to achieve his ends, he had to override default mechanisms that were designed to prevent any accidental or inadvertent movement of those files. His downloading, again, as you heard—but I think it bears repeating—took him nearly 40 hours over 70 different days.

This wasn't all. He carefully and methodically removed classification markings from documents. He attempted repeatedly to enter secure and non-secure areas of Los Alamos after his access had been revoked—33 different times in a period that we can describe to you. He created his own secret, portable, personal trove of this nation's nuclear weapons secrets.

As an expert from Los Alamos testified in this case, the material downloaded and copied represented the complete nuclear weapons design capability of Los Alamos at that time, 50 years of nuclear weapons development, at the expense of hundreds of billions of dollars. Quoting from Dr. Younger, "These codes and their associated

databases and the input file, combined with someone that knew how to use them, could, in my opinion, in the wrong hands, change the global strategic balance. They enable the possessor to design the only objects that could result in the military defeat of America's conventional forces—the only threat, for example, to our carrier battle groups."

They represent the gravest possible security risk to the United States. Before he created the tapes, only two sites in the world held this complete design portfolio—Division X at Los Alamos, and another national laboratory.

And many have asked, If his conduct was so bad, why did the government negotiate a plea agreement and agree to release him? Fair question. Understandable. But it has a very simple answer. The Department of Justice and the FBI concluded that this guilty plea, coupled with Dr. Lee's agreement to submit to questioning under oath and to a polygraph, was our best opportunity to protect the national security by finding out what happened to the seven missing tapes—and, we found out on the way to the courthouse, the additional copies of the tapes which he has now admitted to having made. This was always the object of this investigation and prosecution: Why did he make them, where are they and what happened to them, and who had access to them?

From the moment we learned last year that our nation's nuclear secrets were on missing portable tapes, we have had the central goal to find out what happened to them. This was the goal of the entire national security leadership of our government, not just the FBI and the Department of Justice. Before any charges were brought against Dr. Lee, this matter was analyzed by the highest levels of our government. Working together, we carefully considered the substantial risks to our national security of proceeding with the public prosecution, counterbalanced against the risks of foregoing the prosecution. In the end, there was a consensus that a criminal prosecution of Dr. Lee presented the best opportunity for discovering where the tapes were, why he made them, and who, if anyone else, had access to them.

The decision to prosecute Dr. Lee was made only after repeated attempts to gain his cooperation before indictment. The notion that we could have had this deal earlier is not correct. The government repeatedly told Dr. Lee and his attorneys that in order to avoid indictment—these are negotiations pre-indictment—he would have to provide a full, truthful and credible explanation, one that we could verify, establishing the complete chain of custody of the tapes from the moment he created them. These efforts repeatedly failed because Dr. Lee attempted to impose unacceptable conditions upon his cooperation. Mr. Bay can speak about those, if you wish.

Once the charges against him had been brought, it was still our hope that we could reach a cooperation agreement. Serious discussions about a possible plea agreement began during the late summer when Judge Parker, immediately after taking over the case, strongly encouraged the parties to engage in mediation and, in fact, enlisted a senior judge, Judge Leavy, as a mediator. Although mediation is most unusual in a criminal case, the government entered into these discussions in good faith and worked hard to reach an acceptable solution. Ultimately, a consensus was achieved within

the Department of Justice and a plea agreement was reached. We, the Attorney General and I, are in total agreement with respect to this decision.

It bears repeating that the government made this agreement for one over-arching reason—to find out what happened to the missing tapes. There are other factors that figured in this determination of whether a plea agreement at this time made sense, and we don't intend to gloss over them. They included the following: First, as noted above, Judge Parker had, upon taking over the case, strongly suggested that this case was an appropriate one for mediation and not for trial. In and of itself, this was a signal that the new trial judge viewed this case in a far different manner than his predecessor.

Second and even more critically, Judge Parker then ruled in favor of the defendant in initial proceedings under the Classified Information Procedures Act. It appeared from his ruling that the defendant would succeed in his attempt at "graymail." Although the prosecutors were still litigating these CIPA issues, the judge's reasoning left little room to expect that the government would prevail.

The court's ruling would have exposed extremely sensitive nuclear weapons information during a public trial, crossing an exposure threshold we had already determined, at the highest levels of the government, would pose an unacceptable risk.

Third, Judge Parker had ruled after the August detention hearing that Dr. Lee should be released from his pre-trial confinement. While this ruling was stayed by the Tenth Circuit, which was scheduled to hear the bail matter de novo, we faced the very real prospect that Dr. Lee would soon be released in any event under conditions that we pointed out to the judge were inadequate to prevent Dr. Lee's communications with others. Thus, those who question how the government could argue that Dr. Lee should be confined pre-trial one day and agree to his release the other misunderstand the situation as it was immediately before the plea. The government's argument against release already had been rejected by the trial court.

Fourth, as Judge Parker's August detention hearing also made clear, the court was likely to permit the trial to become a battle of the experts. Indeed, notwithstanding the defendant's experts conceded that they had not actually reviewed the tapes at the time they testified, and notwithstanding the weaknesses in their positions that were explored in the closed portion of the hearing, the court still gave weight to their testimony. Furthermore, it was clear from the court's rulings that it would have been necessary to disclose still more classified information at trial in order to disprove their claim that the material at issue was in the public domain.

Finally, the FBI's lead case agent had had to correct erroneous testimony from the initial detention hearing. The agent acknowledged that he had misstated what one of Dr. Lee's colleagues had told the FBI about Dr. Lee's explanation of the purpose for which he wanted to use that colleague's computer. The agent also volunteered that he overstated certain evidence relating to whether Dr. Lee had sent letters to find outside employment at Los Alamos, al-

though there is, in fact, other evidence that shows that Dr. Lee did send such letters, as the agent originally had testified.

With regard to the agent's first misstatement, while the agent stated that he had made an honest mistake as he tried to make the point that Dr. Lee had not disclosed that his true purpose was to download classified nuclear weapons onto portable tapes, this was a serious matter. It prompted detailed reviews of his testimony by the agent's supervisors and the U.S. Attorney's Office. While we do not believe this error significantly undercut the overall evidence against Dr. Lee, it did affect the agent's credibility and thereby damaged the prosecution.

As the Attorney General has said, the decision to enter into the plea agreement was still a difficult one, for despite those setbacks, the case against Dr. Lee remained very strong. A conviction on each and every count, however, would not have guaranteed the cooperation of Dr. Lee. Dr. Lee's truthful and full cooperation was the one thing the government most needed to protect our national security.

As you already know from press accounts, the plea proceeding was rescheduled at the last moment and the parties went back to their negotiations with the assistance of the mediator judge. This delay has been the subject of considerable speculation in the media. In fact, the delay rests squarely with Dr. Lee, who made a startling revelation just before the plea proceeding was supposed to begin. For the very first time, Dr. Lee revealed that he had made copies of the tapes he had illegally created in the first place. This was an enormously significant development. What it meant was that instead of seven missing tapes, there could be many others.

The plea agreement, which requires Dr. Lee's sworn testimony and requires him to submit to a polygraph, gives him the most powerful incentives to be completely truthful. If he is not, the plea agreement provides that he may be prosecuted.

I would now like to address the disturbing allegations that the government engaged in selective prosecution or racial profiling in its investigation and prosecution of Dr. Lee. There is simply no truth to these allegations. Dr. Lee was not investigated nor indicted nor incarcerated because he is an American of Asian descent. As the Attorney General and the Director of the FBI, we are honored to head organizations that pride themselves with fair and impartial law enforcement. We would never tolerate racial profiling or selective prosecution.

Senator TORRICELLI. Mr. Chairman, if I could ask the Director to suspend for a second, there is a vote in progress, and I'm concerned about leaving and missing any of Mr. Freeh's testimony.

Chairman SHELBY. We want to try to keep the hearing going because we just have one more hour. I haven't left yet. They'll hold the vote in a few minutes. I'm waiting for——

Senator TORRICELLI. How close, Mr. Freeh, are you to the end of your statement?

Director FREEH. About 15 more minutes, Senator.

Senator TORRICELLI. Fifteen?

Senator KYL. We're 15 minutes into the vote, I believe.

Senator TORRICELLI. Well, Mr. Chairman, it's obviously your judgment. I'm just concerned at not having heard the rest of the statement, but it may be unavoidable.

Chairman SHELBY. Well, if we don't, you'll furnish a copy of your statement for the record.

Director FREEH. You all have it, yes, sir.

Chairman SHELBY. Okay. Proceed.

Director FREEH. Thank you, Senator Shelby.

Dr. Lee was investigated and prosecuted because of his actions, not his race. And he has been convicted based solely on his actions.

I'd like to turn to some facts again—the counterintelligence investigation of Mr. Wen Ho Lee, which has been commented upon. Dr. Lee was made known to the FBI in 1982. At that time he worked again in Los Alamos's X Division. His name surfaced when he contacted a suspected agent of a foreign power, who was the subject of an ongoing FBI counterintelligence investigation. He offered to help that person identify who had brought him to the attention of the authorities.

When Dr. Lee was first confronted by the FBI in November 1983, he denied having contacted the individual; in fact, he denied even knowing the person. Only after he learned that the FBI had indisputable proof that the contact took place did he finally admit it.

After providing an explanation of the reasons for the contact, he agreed to cooperate with the FBI regarding the individual being investigated for passing classified information. After he provided limited cooperation, the FBI ultimately closed that first inquiry into Dr. Lee because nothing else developed.

Ten years later, in 1994, Dr. Lee again came under investigation because of his actions. Dr. Lee met with a senior foreign government nuclear weapons designer, who was part of an officially-approved delegation visiting the United States. The circumstances of the encounter clearly indicated that they knew one another, even though Dr. Lee had never reported meeting this individual designer on prior trips abroad, as he was required to do by the conditions of his employment.

The FBI's investigation into this 1994 matter was still ongoing when Dr. Lee emerged as a potential subject in the 1996 administrative inquiry by the Department of Energy into the possible compromise of information related to the W–88 nuclear warhead. Being aware of the potential interest in Dr. Lee, and not wanting to take any steps that would interfere with the inquiry or expose the FBI's interest in him, FBI headquarters and FBI Albuquerque agreed to hold the investigation of the 1994 incident in abeyance.

On May 26, 1996, the Department of Energy's administrative inquiry identified possible potential candidates for the leak, but concluded that "Wen Ho Lee appears to have the opportunity, means and motivation to have compromised the W–88 information." The FBI opened an investigation of Dr. Lee in May 1996, based on this predicate.

Clearly, the FBI should have conducted an additional independent investigation to verify what was reflected in the administrative inquiry. That was not done until years later. Nevertheless, when his name surfaced in the Department of Energy investigation, Dr. Lee already had a history with the FBI. He already had

demonstrated his willingness to lie to the government about his contacts with a suspected espionage subject in 1982, and to not report the relationship he had with a high-ranking foreign official that became known in 1994. He also had twice traveled abroad to meet nuclear scientists. Given those circumstances, the FBI began an investigation of the person who DOE concluded to be the most probable candidate for the W–88 leak. Additional classified information has been provided to the committees about this episode.

As of December, 1998, the FBI had not been able to verify that Dr. Lee was responsible for the possible compromise of the W–88 information. However, in subsequent months, the investigation led to the discovery of the secret nuclear weapons information that Dr. Lee had been accumulating over a period of years from Los Alamos, as I'll explain now.

After opening the investigation into Dr. Lee's possible involvement in the W–88 matter, the FBI sought to develop sufficient indicia of probable cause for the warrant under the Foreign Intelligence Surveillance Act, to conduct surveillance of Dr. Lee. The initial FISA application was submitted in 1997, but was not presented to the court. The Department of Justice and the FBI had a good faith disagreement as to whether the application alleged sufficient probable cause to support the FISA warrant.

The FBI's subsequent efforts to enhance probable cause, which admittedly could and should have been more aggressive, were ultimately unsuccessful. Additional classified information about this portion of the investigation has been provided to the Committee.

In March 1998, Dr. Lee traveled to Taiwan. In later investigation, it was determined he consulted with the Los Alamos computer help desk to determine if he could access the secure Los Alamos computer system from overseas. He was told he could not.

In December 1998, Dr. Lee again traveled to Taiwan for three weeks. He returned on December 21st, 1998. And the Department of Energy, which oversees Los Alamos, conducted a polygraph examination of Dr. Lee, with the concurrence of the FBI, on December 23rd, 1998. The DOE polygraph examination, done by a contract polygrapher, focused on whether Dr. Lee had any unauthorized contacts or shared any classified information with unauthorized persons. During the polygraph, he admitted for the very first time that he had been approached in 1998 by PRC nuclear weapons scientists, one of whom became the head of the PRC nuclear weapons development program, in an effort to obtain classified information about U.S. nuclear weapons.

At the conclusion of the DOE contract polygraph on December 23rd, FBI agents on the scene were told that Dr. Lee passed the examination. This was an opinion that FBI and polygraph experts from another agency later concluded was mistaken.

Immediately after the December 23rd polygraph, based on admissions by Dr. Lee about unreported contacts that he had had during foreign travel, Los Alamos officials informed him that for the next 30 days, his access to X Division where he worked would be denied. He was instructed to report to unsecure space in T Division. Dr. Lee's section within X Division is one of the most secure portion of Los Alamos and a location where nuclear weapons design takes place.

Despite being informed that his access was removed and that he could no longer enter X Division space without an escort, Dr. Lee improperly attempted, without success, to enter the secure area within Division X five different times on the evening of December 23rd, 1998. He then tried again on Christmas Eve, December 24th, at 3:30 in the morning. In addition to those six attempted entries, he made 12 other attempts to enter X Division between Christmas Eve 1998 and February 10, 1999. All such attempts were improper.

Records also indicate that when Dr. Lee officially reported to T Division on January 4th, 1999, after the Christmas holiday, he sought assistance from the Los Alamos computer help desk to revive his X Division secure computing privileges. In making this request, he did not disclose that DOE officials had removed his access to the X Division. Being unaware that Dr. Lee's access to the server had been blocked for security reasons, the computer help desk reactivated his account. Once he regained access to his account, Dr. Lee deleted files from his X Division server.

In the meantime, after being informed on December 23rd that Dr. Lee had passed the DOE polygraph, the Albuquerque Division of the FBI arranged an interview of Dr. Lee in preparation for closing out the pending FBI investigation on him regarding the W–88 matter. The FBI conducted this interview on January 17th, 1999. Throughout the four-hour interview, Dr. Lee sought to appear to be cooperative and forthcoming. He provided new and additional details about contacts he had with foreign scientists, one of whom was related to information causing the FBI's 1994 investigation. Dr. Lee denied any involvement with the loss of the W–88 information.

On January 21st, 1999, at the request of the FBI, he signed under oath a statement that memorialized this interview. At that point, Albuquerque FBI, believing that Dr. Lee had passed the polygraph and was cooperating, advised FBI headquarters that they had serious doubts that Dr. Lee was the appropriate subject of the W–88 investigation. Consideration was given to closing the case.

The FBI had requested, and later received from DOE, copies of the charts from Dr. Lee's polygraph examination of December 23rd. The polygraph unit at FBI headquarters did not receive the copies until January 28th because the FBI did not aggressively pursue receipt of the charts from DOE.

After completing the initial review of the polygraph results on February 2nd, the FBI polygraphers, who conducted a blind review, concluded that Dr. Lee's response to the question whether he had committed espionage against the United States was, at best, inconclusive. Review by experts at another agency of government reached a similar conclusion. The FBI shared the FBI results with DOE immediately.

As a result of this development, Dr. Lee was asked to submit to a polygraph examination administered by the FBI. On February 10th, the FBI conducted a polygraph examination of Dr. Lee, after advising him of his rights. After discussion between the examiner and Dr. Lee about exactly what was being asked, the examiner rephrased the questions by asking Dr. Lee, quote: "Have you ever given any of those two codes to an unauthorized person?

"Answer: No.

"Question: Have you ever provided W–88 information to any unauthorized person?

"Answer: No."

The polygraph examiner concluded that Dr. Lee's responses to these two questions were deceptive.

In the post-polygraph interview, Dr. Lee admitted helping nuclear weapons scientists from the People's Republic of China to solve a mathematical problem that they had previously been unable to solve. Dr. Lee conceded that the solution he had provided could easily be used in developing nuclear weapons. But he stated that he had not given up any classified information.

On March 5th, the FBI interviewed Dr. Lee again. During this interview he consented to a search of his X Division and T Division offices at Los Alamos. On March 7th, the FBI questioned Dr. Lee one last time in an attempt to secure information about his involvement in the compromise of W–88.

Meanwhile however, the search of Dr. Lee's office at Los Alamos was underway. The search disclosed evidence that led eventually to the indictment. The search of Dr. Lee's X Division office produced a notebook containing a one-page computer-generated document that listed all the files on a directory that Dr. Lee had created within the common file system at Los Alamos.

An X Division physicist examined the list of files, given the name "kfl" by Dr. Lee, and determined that the files listed in Dr. Lee's kfl directory were contained in the open or unclassified part of the common file system. The physicist then confirmed that the file descriptions appeared to refer to highly classified information concerning thermonuclear weapons design and testing, information that under no circumstances should have been in the unclassified directory. This discovery caused Los Alamos scientists to search the X Division portion of the common files system.

The physicist who reviewed the list found in Dr. Lee's notebook, logged-on to the system and tried to access the files listed in Dr. Lee's kfl directory. He discovered that the majority of the files had recently been deleted. Examination of all of Dr. Lee's directories showed that Dr. Lee had deleted more than 360 files and two complete directories between January 20, 1999, three days after being interviewed by the FBI, and February 10, 1999, the very day he was polygraphed by the FBI. The government was able to determine that the deleted files contained highly-classified nuclear weapons data.

As an indication of Dr. Lee's criminal intent, and his awareness of the classified nature of the files, the following circumstances, among others, are relevant.

He started improperly manipulating and moving the files in question from the classified to the unclassified system in 1993. He did not begin to delete those files until January 20th, 1999. They remained on the unclassified system for as long as six years before Dr. Lee began deleting them. The deletions started three days after the January 17th interview.

In addition, two days after the deletions began, Dr. Lee again contacted the help desk at Los Alamos and asked for help in deleting files. Specifically, he was concerned that, despite his best dele-

tion efforts, the files were "not going away." The help desk explained to Dr. Lee that this was a safeguard built into the system in case a file was accidentally deleted. The safeguard ensured that a backup copy of the deleted file remained in the system for a period of days.

Dr. Lee inquired whether there was a way to delete these backup copies. And after being instructed how to do so, he deleted the backup files that had been automatically created by the system as a result of his deleting the original files.

On February 1st, 1999, he again contacted the help desk for assistance because he was connecting to the Los Alamos computer system from home but kept getting disconnected. Finally, he deleted files on February 10th, 1999. On that day, he deleted 310 of the 470 files that he had improperly moved from the classified to the unclassified system, after being informed he had failed the polygraph and admitting that he had been approached by scientists at night in his hotel room and had helped nuclear weapons scientists from the People's Republic of China.

After discovering the list of files and their apparent deletion from the system, Los Alamos officials immediately undertook the highly time-intensive process of recovering Dr. Lee's deleted kfl files from the archival portion of the common file system. By the end of March 1999, experts at Los Alamos had retrieved the entire contents of the kfl files, confirming that he had indeed moved highly sensitive nuclear weapons information from the classified to the unclassified side of the Los Alamos computer system. An exhaustive computer forensic effort later established effecting these transfers required numerous deliberate steps. This was no accidental or inadvertent method.

First, as with any authorized Los Alamos user, Dr. Lee was required to log on to the computer system with his password and ID number. For audit purposes, the system was designed to provide an audit trail that was traceable to the user's unique number. According to Los Alamos officials, the tracking capabilities of the computing system were not widely known.

The computing environment at Los Alamos in 1993 and 1994 consisted of four partitions, two of which are relevant to the charges against Dr. Lee, the open green partition and the secure red partition. The open partition allowed only unclassified computing, and users were not required to have any type of security clearance. The secure partition allowed both classified and unclassified computing, but only by personnel with Q clearances, which, of course, Dr. Lee had. The Q clearance is a security clearance required to access classified nuclear weapons data. It's the highest clearance at Los Alamos.

The common file system spanned the partitions and operated as a hierarchical system. That is, it allowed work to be performed at lower classification levels in higher security partitions, but not the reverse. In order to lower the classification marking of a file, the file had to be down-partitioned and saved as a new file to the CFS at the lower classification level. The computer used to down-partition a file was called Machine C. As previously mentioned, Dr. Lee was assigned a unique ID number that allowed him access to the

secure portion and to Machine C, which was used for the down-partitioning.

After logging on to the secure, or red, partition, Dr. Lee would identify the classified material he desired, then save it in a secure directory by physically typing into the keyboard "save," and then typing "CL=U," means classification level equals unclassified. By making these deliberate key strokes, he was able to move material to the unclassified level even though the material was actually classified. He would then use Machine C to down-partition the material from the secure partition to the open partition. He would then save the material to an open, green, directory.

The material, which of course remained classified, was then available in electronic form in the open side of the computer and, therefore, could be accessed by any machine connected to the Internet. The material was available from any computer in the world, to any user who had or who has Dr. Lee's identification number, password, or through hacker intrusion. It was also available for copying onto portable media, such as magnetic tape.

As charged in the indictment, each of the 19 files he down-partitioned were called TAR files, T-A-R, meaning each was a collection of many small files. The audit system tracked not only the movement of the files, but the content of the files as well. Two X Division scientists fully familiar with the material confirmed that the files transferred to the open system contained highly sensitive information about the most critical and powerful weapons of the U.S. nuclear arsenal.

The search of Dr. Lee's office also revealed three multi-page documents that did not bear classification markings as required by regulation, despite the fact that those documents contained classified information.

Subsequent forensic investigation revealed that the classification stamps or marks had been removed in several ways. First, in one, the classified stamp had been covered up while the document was copied. In another, the classification markings had been physically cut from the top and bottom of each page. In the third, the classification marking had been deleted by computer command before the document was printed.

According to Los Alamos officials, there is no bona fide work-related employment purpose in deleting classification designations or markings from a classified document. In fact, those deletions would be a violation of Los Alamos security regulations.

On April 10th, 1999 shortly after these discoveries were made, the FBI executed a court-ordered search warrant at Dr. Lee's residence, a search which I might add, Judge Parker upheld. During the search, agents found a three-ring notebook that indexed 13 portable computer tapes designated by Dr. Lee as tapes A through M. Dr. Lee's index for tapes A through M include a file name and the size in bytes of each file. This index provided independent corroboration that the files Dr. Lee improperly downpartitioned onto the open system at Los Alamos were the very same files that he downloaded onto tapes A through M. The notebook in his residence also contained detailed, step by step, keystroke by keystroke instructions for downloading the restricted data files found in his kfl directory.

Dr. Lee also had a handwritten notation in Chinese in his notebook that there was a tape N, which was the only copy of those particular files, and that the files were not in his kfl directory. Tapes A through M were created in 1993 and 1994. Tape N was created in 1997 and contained the most up-to-date data on nuclear testing, data that would have greatly enhanced the usefulness of the 1993 and 1994 data.

In 1997, when tape N was downloaded by Dr. Lee, the policy at Los Alamos had changed to allow users to attach tape drives directly to a secure system. During Dr. Lee's downloading in 1993 and 1994, tape drives were not available to individual scientists, and downloading could take place only with the assistance of an X Division computer specialist. By attaching a tape drive in 1997, Dr. Lee did not need to downpartition files and place them on the open system in order to make them available for downloading onto tapes. Instead, in 1997 he could download directly from the secure partition to the tapes. But as noted, he had to take more elaborate steps to create tapes A through M in 1993 and 1994, since he did not then have a tape drive on his own X Division computer.

Instead, he went outside of X Division to a computer of another Los Alamos employee in another division. That employee taught Dr. Lee how to log onto the employee's computer and make tapes by downloading files onto the tape drive. Dr. Lee also obtained that employee's access number. Significantly, because he was outside X Division, this employee's computer could not access the secure red partition. But again, as noted above, Dr. Lee already had defeated that security precaution by using his X Division computer to move the files to the open system. He could then download the files onto the tapes from a computer outside X Division, which is precisely what he did.

Restricted data is statutorily defined in Title 42 US Code to include all data not previously released by DOE concerning the design, manufacture and utilization of atomic weapons, the production of special nuclear material, or three, the use of special nuclear material in the production of energy. Restricted data is classified at three levels: top secret, secret, and confidential.

The evidence and the facts indicate that Dr. Lee downloaded files relating to the design, construction and testing of nuclear weapons. And you've heard about those this morning, earlier.

All this information was classified at the secret/restricted data or CRD level, and we now know that Dr. Lee downloaded this information to computer tapes. Some of the downloaded and copied codes were the same codes in two formats—significantly, one designed to run on a Cray supercomputer; the other format, however, designed to run on non-supercomputers.

During the search of Dr. Lee's office in the T Division, the FBI recovered, among other tapes, three tapes that later were determined to contain classified information. Two of the tapes had intact classified data remaining on them. The third of these three tapes appeared at first to contain only unclassified data, and I think this is very significant. Subsequent forensic review of this tape revealed that Dr. Lee had reconfigured the tape in February of 1999, after—after—he learned that he was the subject of the FBI espionage investigation.

In reconfiguring the tape, Dr. Lee uploaded this tape onto a computer, deleted three classified files, while keeping the unclassified data, and then downloaded the unclassified data back to the tape. He then returned it to the shelf in his T Division office.

Dr. Lee accomplished the reconfiguration by approaching one of his new T Division colleagues and telling him that he needed to use the colleague's computer tape drive in order to conduct some unclassified work that he had stored on tape.

For the reasons stated above, Dr. Lee could not have inadvertently moved classified information to the unclassified side without knowing that the information was in fact classified. When he realized that he was the subject of an FBI investigation, he deleted exactly those downloaded files that were problematic for him. And again, the classified files he deleted had remained on that open computer for more than five years.

As we enter the debriefing process, we are cognizant of the pattern that has repeated itself during the past 18 years, beginning in 1982. Dr. Lee's initial response to investigators' questions was a staunch denial of any wrongdoing, followed by admissions when confronted with incontrovertible proof. Not until after his February 1999 polygraph did he admit to the scope of his assistance to nuclear scientists from the People's Republic of China.

Similarly, through his counsel in this case, Dr. Lee initially denied creating any tapes of the downloaded information. When confronted with forensic proof, he conceded that he had made tapes, but maintained that the information on them was unclassified. Now, of course, we have evidence to prove that the information on the tapes was classified.

Finally, he's now at last admitted that he made copies of at least some of the tapes he initially created.

The FBI uncovered no direct evidence that Dr. Lee passed classified information to a foreign government. The circumstantial evidence, however, that Dr. Lee collected the files with the intent to injure the United States includes, one, X Division physicists were prepared to testify that the secret restricted data contained in the files and downloaded tapes represent the most sensitive information collectively possessed within X Division at Los Alamos. Dr. Lee knowingly and willfully placed America's most sophisticated information regarding the design and construction of nuclear weapons on an open computer system and then copied this information onto portable tapes that are still missing and alleged to have been destroyed.

It was not a simple task for him to move files from the closed to the open system. The common file system tracking system reveals that he spent hours unsuccessfully trying to move these files into unclassified space. He eventually worked his way around what was designed to be a cumbersome process. He had to command the computer to "declassify" the files when he was well aware that the files contained some of the most sensitive information at Los Alamos. He spent many hours assembling the files that he wanted to download. Those files contain entire sets of certain classified information that scientists at Los Alamos would testify are rarely used in their entirety, because of their size.

His colleagues were prepared to testify that there was no legitimate work-related reason to assemble the files in the manner Dr. Lee did, much less move it to an open directory.

In addition, Dr. Lee was not directly working on a significant amount of the data he collected. His colleagues would have testified that Dr. Lee had little involvement and no direct work-related reason to use the information he assembled.

X Division scientists most familiar with the downloaded information would have testified that Dr. Lee took every significant piece of information to which a nuclear weapon designer would want access. He downloaded this data onto portable tapes, and then also made copies of at least some of them. According to X Division scientists, the information was designed to run on secure computers at Los Alamos. There is no legitimate work-related reason for creating tapes of this information. The creation of the tapes further evidences an intent on the part of Dr. Lee to remove the information from the control of the United States.

Dr. Lee worked secretly to create the original nine tapes, using a colleague's unsecure computer, as well as the colleague's password, without any legitimate work-related purpose. His deletion of X Division secret restricted data files, that he had moved from the closed to the open system at a time when the FBI alerted him to their investigation and his failed polygraph, compellingly demonstrates his consciousness of guilt. The evidence also indicated that Dr. Lee had sought employment overseas during this period of time.

The key pieces of evidence in this case, including the file list found in his office, the classified files themselves that Dr. Lee had deleted from this computer, and the detailed outline in his own handwriting found in the notebook in his residence, once analyzed, explained and understood in context, established that he willfully jeopardized the nation's most valuable nuclear secrets. He did so first by removing them, and later by putting them on an open system, and finally, making tapes.

What he did with those tapes has been, from the moment of discovery, of paramount concern to the government, and explains the government's decision to enter this plea agreement with Dr. Lee. Although we remain convinced that a successful prosecution of Dr. Lee on all 59 counts could have been brought, barring CIPA obstacles, we are equally convinced that a plea agreement provides the best available opportunity to gain the information needed to assess the full extent of the damage done to the national security by Dr. Lee.

This point is driven home by the fact that despite the government's interview of over 1,000 witnesses, review of 20,000 pages of documents in English and Chinese, and the forensic examination of more than 1,000 gigabytes containing more than one million computer files, we only recently discovered a very critical piece of information from the defendant himself, the fact that, as I've said, in addition to the downloaded tapes, through his counsel we were advised that he had made copies of at least some of the tapes. That revelation in itself is testament to the importance and the efficacy of this plea bargain.

I apologize for the length of my statement, but I thought it was very, very important to have these facts on the record. The government has not been given that opportunity. And thank you, Mr. Chairman, for your very kind indulgence.

Chairman SHELBY. Thank you, Judge.

We'll hear from the Department of Energy now. Mr. Secretary.

STATEMENT OF THE HONORABLE T.J. GLAUTHIER, DEPUTY SECRETARY OF ENERGY

Mr. GLAUTHIER. Thank you, Mr. Chairman. Thank you, Mr. Chairman and members of the Committee, for this opportunity. As you know, Secretary Richardson is appearing before the Senate Energy and Natural Resources Committee at this same time to discuss the current oil situation, so I'm here in his place.

I'm here to discuss the Department of Energy's technical role in the investigation and prosecution of Wen Ho Lee. First, it must be underscored that the violations committed by Dr. Lee were serious. We believe the results of the intelligence community's damage assessment clearly proved that the data on the tapes is crucial to our national security. Given what was on the tapes, we believe the prosecution of Dr. Lee was justified. We also believe that some of the public claims belittling the seriousness of the tapes are inaccurate. Finally, we support the recent plea agreement as our best chance to get to the bottom of this and to learn what happened to those tapes.

First, let me explain as much as I can in open session that the information Dr. Lee downloaded is serious. The codes and associated databases on the downloaded tapes constitute an extraordinarily broad set of classified tools used by this nation's nuclear scientists for the design and assessment of nuclear weapons. In the wrong hands, the tapes could provide valuable information for the development and design of advanced nuclear weapons.

It would be a mistake to underestimate the importance or sensitivity of the contents of these tapes. The information on the tapes represents a practical and integrated scientific understanding of how nuclear explosions work. They include databases cataloguing the properties of matter at high temperatures and pressures derived from nuclear tests, and the detailed physics design of nuclear devices that we know work from past U.S. nuclear tests.

The tapes are not a complete recipe for designing and building a nuclear bomb, as critical engineering, metallurgy and materials fabrication information is not provided. But the tapes do represent the design know-how and physics information developed by our nuclear labs over a period of 50 years and over 1,000 nuclear tests. The weapons designs on these tapes work, and the tools provide vital information on how we design and understand nuclear weapons. That is their importance and why they clearly need to be protected.

Let me correct the record with respect to some misunderstandings about this data that have arisen over the past several months. First, it has been claimed that 99 percent of the information in these computer codes was unclassified. That statement is not correct when applied to the totality of these files. The individual physics models and mathematical algorithms may not be

classified, and in many cases, are available in the open literature. However, the way they are assembled, along with classified physical databases and specific weapons configurations, which are also on the tapes, is highly classified as restricted data under the Atomic Energy Act.

Second, the claim that the material Dr. Lee downloaded and removed from the X Division was not classified or restricted until after the fact is not correct. Computer files in the X Division, including the material at issue in the Wen Ho Lee case, is automatically restricted as soon as it is produced by a computer. When produced from classified computers, it automatically receives a designation, PARD, "protect as restricted data," and requires a Q clearance for access to it because of a presumption that it contains secret, restricted data.

In order to remove this information from the X Divison, it must undergo a comprehensive classification review conducted by a certified classifier. It is a security violation to remove such material without a certified classification review. Once we determined what had been taken, our classifiers conducted a review and determined that the material was classified as secret restricted data.

Returning to the broader issues of this inquiry, the department supported bringing the criminal case against Dr. Lee because of the very sensitive nature of the information and the enormity of the effort undertaken by Dr. Lee to download that information. We did so only after conducting a classification review to satisfy ourselves that there was a reasonable prospect that the prosecution could proceed without the public disclosure of classified information at trial.

In addition, it was because of the very sensitive nature of the information, and because we were advised that special administrative measures were the only way to protect against further disclosure of the information while Dr. Lee was awaiting trial, that we signed the certification requested by the Department of Justice supporting the special administration measures.

It was also because of the very sensitive nature of the information and our need to know why, how, and to what extent Dr. Lee compromised that information, that we support the plea agreement that the Justice Department has negotiated. The terms of that plea agreement result in a felony conviction of Dr. Lee and a process by which we hope the government can get answers to those important questions.

Thank you.

Chairman SHELBY. I guess my first question would be to Attorney General Reno and Judge Freeh.

The initial decision to prosecute Wen Ho Lee reportedly was made at the Justice Department shortly before Thanksgiving in 1999. On December the 4th, 1999, Attorney General Reno, Director Freeh, Secretary Richardson, Director of Central Intelligence Tenet, Deputy Defense Secretary Hamre and other officials met with National Security Adviser Berger at the White House to discuss the prosecution, including the risk of disclosure of classified information in the course of a prosecution. Is that basically right?

Director FREEH. Yes, sir.

Attorney General RENO. Yes, sir.

Chairman SHELBY. The first question to all of you—to you, too, of course—did any agency, office or individual official object to the prosecution on any grounds? And if so, on what grounds? Judge Freeh, you want to address that, or does the Attorney General? At that meeting.

Director FREEH. Yeah. I'll be happy to give an answer to that, Senator. I don't want to in an open session——

Chairman SHELBY. Do you want to give that——

Director FREEH. Well, I can give some of it now, but I'd like to give the details in the closed session.

Chairman SHELBY. Okay. Go ahead.

Director FREEH. The issue at the meeting was if the prosecution were to proceed, several national security issues had to be addressed. Those were addressed at that meeting. My attendance at the meeting and my perception of the meeting is those were answered to everyone's satisfaction without a final decision being made at that meeting, but for one to be made in the next day or so. And as you know, the indictment proceeded about six days later.

Chairman SHELBY. Sure.

Attorney General Reno, did the President or any of his representatives at this meeting ever indicate that the President was not convinced that Wen Ho Lee should be arrested and prosecuted? In other words, was there any objection there?

Attorney General RENO. The purpose of the meeting was to determine whether there would be national security exposures. It was not the issue of prosecution. And they distinguished between the law enforcement side of it and the national security side. And the President's advisers did not in any way object, but they did not approve. They said the law enforcement issue is yours. The national security issue——

Chairman SHELBY. You're the Attorney General. So it was placed in your lap, and you moved forward, correct?

Attorney General RENO. Well, I'm responsible for it under the Atomic Energy Act.

Chairman SHELBY. Absolutely. Sure. What was the impact on the prosecution, Attorney General Reno, on Judge Parker's decision to require the government to provide extensive classified information for his review for possible use at the trial?

Attorney General RENO. That was one of the factors that we considered.

Chairman SHELBY. Okay. Do you agree with that, Judge?

Director FREEH. Yes. And in fact, we had lost the first round of the CIPA procedures, and the view of the prosecutors was that we would not be successful before the trial court on the substitutions that we were going to offer. And this was a very significant factor in our decision.

Chairman SHELBY. We will get into a closed session with all of you on this, as Judge Freeh indicated.

Senator Bryan.

Senator BRYAN. Thank you very much, Mr. Chairman. There are many, many questions that we need to ask. And much of this I find to be very, very troublesome.

Mr. Glauthier, let me ask you on behalf of the Department of Energy, about actions before the incident that brings us here—I said "the incident"—the criminal activity of the downloading. There was a pattern, a pattern that dated back to 1983, some of which we can discuss publicly, some of it we can only discuss privately. But regarding the false statement by Dr. Lee with respect to contacting an individual who was under investigation for espionage, the denial, the inappropriate contact, the failure to report, a whole series of activities predating this downloading, am I correct that a security clearance is not a constitutional right?

Mr. GLAUTHIER. Yes, Senator, of course.

Senator BRYAN. There is enough about this activity that would invite, I think, the suspicion of anyone that maybe it does not prove espionage—I would acknowledge that—but the handling of classified information is very important. You have said, as have Attorney General Reno and Director Freeh, and I happen to agree, that this information is highly sensitive, highly classified, contrary to some of the assertions we've heard in the press. So we're on the same page on that one. Why was no action taken, or was there action taken, to revoke his clearance at that time? This predates the downloading.

Mr. GLAUTHIER. It does predate this Administration, and I'm not able to speak to the specifics. I do know that we have spent a lot of time trying to address the broader questions of security and security enforcement at the various laboratories.

Senator BRYAN. I must say I find that very problematic.

I mean, here we are with the crown jewels, as they have been referred to in previous context, and yet seemingly, to the best of your information, no effort was undertaken to revoke his classification or even to review it. Is that what you're saying, Mr. Glauthier?

Mr. GLAUTHIER. I am not aware of any effort to do either of those things.

Senator BRYAN. Director Freeh, you know, lying to an FBI agent about contact with someone who's under investigation for espionage does not prove, per se, espionage activity, but it's certainly more than just a little white lie. This is something that is very serious. It doesn't deal with an individual's personal relationship with his spouse or any kind of relationships that he may have on a personal level that may be embarrassing; this relates to his line of work. Did the FBI ever recommend to the Department of Energy, "This individual's classification and access to top-secret information should be reviewed and considered"?

Director FREEH. We did, Senator, although it was well after the making of the tapes, in August of 1997.

Senator BRYAN. But this activity, as you know, Director Freeh, dates back to the early '80s—'83, '88 for some contacts. So I take it that there was no such recommendation made at that time frame.

Director FREEH. As far as I know, from my briefings and the file, no such recommendation was made.

Senator BRYAN. And Director Freeh, even after the false statements that were given by Dr. Lee, my information is that it took more than a year after that for any follow-up on the part of the Bureau. Is that your information as well?

Director FREEH. The inquiry went for that period, but during that time, I'd point out, he did pass the polygraph with respect to the questions about espionage. He did provide some cooperation to us with respect to questions that we asked. So there was a period of some activity during that year.

Senator BRYAN. Would you agree, Director Freeh, that there is a difference between passing a polygraph on espionage—which, assuming that the polygraph is accurate, or you believe it to be so, and you've related that circumstance, which may not warrant pursuing a prosecution—and the issue in terms of handling classified information, in which espionage is not the threshold that has to be reached?

Does it strike you in hindsight, looking at these incidents that I've outlined prior to the downloading information, that this is an individual who ought not to have had access to what you've all testified to, and which I agree is extraordinarily sensitive data?

Director FREEH. I agree. He shouldn't have kept his clearance after that.

Senator BRYAN. Let me ask Attorney General Reno and Director Freeh about the other end of this spectrum. There's much more that we'd like to get into, but the thing that does trouble us, I think, all—and I don't agree with the characterization made by some that Dr. Lee is an innocent victim here—but the manner in which he was confined is, in my view, very difficult to justify—I mean, having the individual manacled, if true, during his exercise period, and a light turned on in his room. I guess my first question to either you, Attorney General Reno, or Director Freeh: What were the physical circumstances of his confinement? Is the information that we've heard accurate?

Secondly, my question would be, am I correct that other individuals who have been charged with espionage have not been subjected to that level of personal degradation or confinement, acknowledging that you don't want this individual to have access to outside contacts to pass along any information? I concede that part of it, but this just strikes me as being an extraordinarily excessive degree of treatment.

Attorney General Reno, let me give that one to you.

Attorney General RENO. Just going beyond the detention decision, which you seem to accept——

Senator BRYAN. Yes.

Attorney General RENO [continuing]. Let me just talk about the shackles. There is no federal prison or detention facility in New Mexico. The closest are LaTuna, Texas, and Florence, Colorado, hundreds of miles away from Albuquerque. He was placed in the administrative segregation wing of the Santa Fe County Detention Facility, a facility which was under contract to the United States Marshals.

He wore the shackles not in the cell but when he was being moved from place to place outside the cell. And that was the same treatment as to any prisoner in administrative segregation at Santa Fe County.

We addressed that issue and tried to effect change and were ultimately successful. But I think that there were issues raised about treating people the same way and departing, on the part of the

prison or the jail authorities, from standard procedures for prisoners who were in segregation.

We heard about the light for the first time the other night. That had never been raised. And the issue of shackles had never been raised by his lawyers. We took steps to ease his conditions very early on, and he received special treatment. He got a radio. The FBI made a Mandarin interpreter available in case Lee wished to speak Mandarin to a family member. The times of his phone calls to family were changed to accommodate him; family visitations were changed to Saturdays; his exercise hours were changed; and the shackles were ultimately removed during exercise. He was allowed to exercise seven days a week and he was given more fruit.

Senator BRYAN. What was that time frame, Attorney General Reno?

Attorney General RENO. This is from December until mid-July that these changes took place.

Most importantly, a suite of offices was built, furnished and equipped—at Department of Energy expense—at the courthouse to allow Lee to review classified material and to help his lawyers prepare for trial. Beginning in late April of 2000, Lee was at the courthouse four or five times a week for six to eight hours a day. According to the Marshal Service, he made a few trips to Los Alamos as well.

I think issues arose with respect to shackles while he was there. And I asked if it weren't possible to remove the shackles and to provide additional Marshal Service.

Senator BRYAN. Would you agree that that was unnecessarily harsh to have him shackled?

Attorney General RENO. Again, I think we were ultimately successful in getting the shackles removed at the County Jail. And I think——

Senator BRYAN. With great respect, that was not the question I asked. I——

Attorney General RENO. Well that's—I agree with you, and I was telling you what I would try to do.

Senator BRYAN. So you agree that it was unnecessarily harsh to have him shackled?

Attorney General RENO. I would agree. I also think that there were administrative issues that the jail had to deal with.

Senator BRYAN. And you did not request that—the Department of Justice did not request that he be shackled and put in a cell with the light on?

Attorney General RENO. One of the things I have to clarify for you and I can't—I'm not able to now, but I will do so—was the confinement imposed by the Marshal Service different than that from the jail when he was at the facility that had been created by the Department of Energy.

Senator BRYAN. Well, we can get into that.

Thank you very much, Mr. Chairman.

Chairman SHELBY. Senator Leahy, we have about 10 minutes left. Would you take five minutes and I'll give Senator Specter five, if you can.

Thank you.

Senator LEAHY. Okay. Thank you, Mr. Chairman.

You know, Judge Parker had expressed frustration that the prosecutors were ignoring his request to improve Dr. Lee's condition of confinement. Of course, it had been a nine-month period from April through December, 1999—he was free and could be moving a lot; whether he's being tailed or not, he had a great deal of freedom.

Did the government respond to Judge Parker's request regarding the condition of Mr. Lee's confinement?

Attorney General RENO. Mr. Bay may want to address that, but we—I think I gave you the steps that we took to address the issues of confinement.

Senator LEAHY. But have you responded, has the government responded in any way to the criticisms that Judge Parker made?

Mr. BAY. Well, let me review what we did in light of the judge's comments.

First, we were in contact with defense counsel, and we were able to accommodate almost all of their requests.

Senator LEAHY. I'm talking about his last and very public comments. Was any response made?

Mr. BAY. We met with Judge Parker—the lead prosecutor met with Judge Parker last Friday, but it was not to discuss the conditions of confinement.

Senator LEAHY. Now, I understand the debriefing with Dr. Lee was supposed to begin today. Is it beginning today?

Director FREEH. No, sir.

Senator LEAHY. Do we have a number of the people that would be involved in that debriefing, were they, instead, involved with preparing for this hearing today?

Director FREEH. Many of them have been, yes.

Senator LEAHY. Director Freeh, when you wrote to the Subcommittee on December 10th, 1999 and requested we postpone hearings on this matter, you said that to hold hearings "poses a substantial risk not only to the prosecution, but to the government's ultimate ability to discover the full extent of the damage done."

And you and the Attorney General have indicated—outlined in public hearings today all the reasons for the plea agreement and the evidence against Mr. Lee might pose tactical disadvantages to the government during the debriefing sessions, when those do take place.

Do you still feel that way? And are there risks or disadvantages to the government in future debriefings of Mr. Lee or Dr. Lee, based on these hearings?

Director FREEH. I certainly continue to believe that in December that was not only an appropriate but a necessary request. I want to particularly thank Chairman Hatch, yourself, Senator Specter and Senator Torricelli for delaying the hearings at that point.

We don't know, again, the answer to the most important question that we have to put to Mr. Lee, as soon as we commence that debriefing. I can't judge whether anything that would be done in an open hearing, maybe has been said even by myself, would adversely affect that. But clearly, that is our most important objective.

Senator LEAHY. General, do you want to add to that?

Attorney General RENO. I think that's correct.

May I just add something that I think is important? This is a memorandum from Raymond L. Cisneros, who is the sheriff, and acting in his capacity as jail monitor. And this is in Santa Fe County, New Mexico. It is a memorandum to the county manager, and it's dated March 10th, 2000:

This is to inform you that earlier this week I received some phone calls from unknown persons concerning that Mr. Lee was being mistreated and not properly cared for in the jail. Today at 9:30 a.m. I personally met with Mr. Lee for about 20 minutes in his jail cell. I explained my role as jail monitor and the calls I received. Other than being incarcerated, he had no complaints. The staff was treating him very well. He singled out Warden Bararas and Deputy Warden Romero as treating him great. He told me had seen a doctor when requested, had not been sick or ill at any time during his incarceration. His only request was for additional fruit at the evening meal, which I relayed to Warden Bararas.

I gave him my business card and told him to contact me through his attorney if there was any mistreatment or other issues regarding his incarceration. At no time did we discuss his case or any facts relating to it. I emphasized my role as the jail monitor. Because of the high-profile nature of this case, I felt it was necessary to either confirm or disprove the allegations. Mr. Lee was very surprised about the calls and stated, "I haven't complained to anyone about the jail because I'm being treated very well." Please brief the commissioners in case they're confronted by any concerned parties that may try to make demands.

Senator LEAHY. I'll submit my other questions for the record, Mr. Chairman, especially a question I wish both Ms. Reno and Mr. Freeh would look at—whether Dr. Lee had made any offers of cooperation before he was indicted, and whether they were deemed acceptable or unacceptable to the government, and why.

Chairman SHELBY. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

The issue as to complaints as to Dr. Lee being manacled are very different from what has been reported to our Subcommittee to what we're hearing here today. And in a very terse statement, Mr. Glauthier says that, "We"—DOE—"were advised that special administrative measures were the only way to protect against further disclosure; that we signed the certification requested by the Department of Justice supporting the special administrative measures."

We don't have time to go into this now, but on the face of what DOE has said here, there are special administrative measures. And there are very reliable reports about the judge complaining about the manacles. And the attorneys, too, said that when they talked to him, they took off his hand manacles, but when he went to the men's room, they put back the hand manacles, in addition to the leg manacles, and connected the manacles to his waist.

You have put in your written testimony, Director Freeh, that the agent's reference to the Rosenbergs was inappropriate. And then you have the testimony of Mr. Messimer, which was false—I think a very unusual situation, especially in this high profile case. The inference is very compelling, it seems to me, Director Freeh, a tough inference—and I'll give you a chance to respond—that this treatment to Dr. Lee was made to try to force him to plead guilty.

Do these factors have any other justification?

Director FREEH. Well, I would disagree very strongly with the suggestion or the notion that anything was done with respect to confinement, or anything else in this case, to improperly or unfairly treat Dr. Lee.

First of all, on the shackling issue, as the Attorney General and I have said, we were not aware of this being a factor. And it's pretty interesting that, with the most capable and litigious lawyers that I've seen in 25 years of being a prosecutor and a judge, they never raised this issue. There's no motion papers that I know of, and I'll let Mr. Bay speak to that, but this was not an issue brought to the judge; so how much of a concern was it really at the time?

Senator SPECTER. Well, DOE says that they made a certification requested by the Department of Justice to support special administrative measures. Well, we going——

Attorney General RENO. Senator, the——

Senator SPECTER. I have one more question I want to ask.

Attorney General RENO [continuing]. Shackles do not—are not provided for in the SAM, the special administrative measures.

Senator SPECTER. Well, we're going to get to that in detail. We've requested the documents.

In the limited time available before we have to adjourn, Director Freeh, do you disagree with what Judge Parker has said here, that the offer was made by the defense lawyers to have Dr. Lee give all the information long in advance? Let me couple that with a question as to why the Department of Justice waited so long. In April, when you had the notebooks, you knew what the downloading had been. In fact, there was evidence about the downloading back in 1993 and 1994. When that downloading placed in Dr. Lee's hands such tremendously important information, why did you wait until December to bring an indictment when you could put him into custody?

In that interim, having access to those tapes and codes, he had a full opportunity to disseminate it to anybody. But then suddenly in December, the indictment is returned and he's subjected to what I consider to be highly unusual restraints. And we intend to probe that. I'm not satisfied at all with what I've heard here today.

But what is the answer to the long delay between April to December, and then Judge Parker's flat statement that you had access to this to find out what happened to the tapes in December instead of waiting till September 2000?

Director FREEH. Senator, I'll respond to that. I'd like to ask Mr. Bay to address part of it because he was directly involved in the review of the negotiations with the defense lawyers.

First of all, the offer that was accepted and agreed upon in September, in my view and the understanding of everybody at this table who was participant to that briefing, was not available before, had never been made available before by the defendant. This was the first time an offer of this context was made.

I'll let Mr. Bay address that.

With respect to the delay between April and December, this is a hugely complex case. This is not a matter where we go into a magistrate judge with a complaint and ask for an arrest. We reviewed during that period a million computer files. We interviewed a thousand people. We had to know that everybody in Division X was not engaging in this behavior—which, as it turns out, nobody but Dr. Lee was, in fact. This was not a case where we could just tell the Department of Energy, "We're going to bring a prosecution

and, oh yeah, maybe we're going to have to litigate whether we can disclose the context of a particular primary, because that's going to be the subject of graymail in the case." There had to be national security reviews. This was an extremely complex investigation and prosecutive process. It could not have been brought, in my view, fairly and accurately before it was.

Mr. BAY. Senator Specter, with respect to your other question, the letter from the defense counsel dated December 10th, 1999, which I am assuming you are referring to, in fact was an illusory offer. That letter was sent to us as the grand jury was finishing up its work, and then the grand jury deliberated and returned the indictment. Once the indictment was returned, the defense counsel retracted that offer. We counteroffered, asking for a full interview of the defendant prior to a polygraph. And that's a pretty important part of any adequate polygraph examination. They wouldn't go for that. They sent us a letter dated January 5th, 2000 in which they said that the exam could only consist of three questions. And we didn't find that to be appropriate. But it's also important to keep in mind the full context for what happened here.

This case got referred to the U.S. Attorney's office in New Mexico in February or March of 2000. We tried to get defense counsel to cooperate with us for nine months, until December 10th when the case was finally indicted. But they didn't want to do that. In fact, the one time that Dr. Lee came to the office, the U.S. Attorney's office in New Mexico was on June 21st, 1999. He comes in with his lawyers. His lawyers are doing all the talking. They're providing a proffer to the government.

His lawyers proffered to us that Dr. Lee never downloaded classified information onto the portable magnetic tapes. His lawyers apparently did not know that by that date our computer forensic scientists had determined that this download had, in fact, occurred. We called them on that. We called them on that misrepresentation. They go back to their client, they come back and they say, well, if he put this information on these tapes, he destroyed the tapes.

That, I think, captures what was going on in that nine-month period when we were trying to get answers from Dr. Lee—answers that he was not willing to provide.

Senator SPECTER. Well, I can understand a proffer which is inaccurate and false early on, based on information the lawyers get from their client. And I can also understand why, after he's indicted, they're not going to follow up on an offer. But Judge Parker laid it out very flatly that their attorneys made a written offer to have an explanation of the missing tapes under polygraph examination.

But we're going to have to go into it in detail.

Chairman SHELBY. Senator Specter, thank you. But under the rules of the Senate, I'm compelled to terminate the hearing. We are going to go into a closed hearing. I think it's imperative.

And I want to thank all the witnesses here—I think it's very important.

Senator SESSIONS. Mr. Chairman, I'd just like to say that it's unfortunate that the members on the other side have invoked this unusual rule that's cut this Committee hearing off. I think that's unhealthy; it's hurting the Senate in a whole lot of ways, and it's

part of a consistent program of obstruction, in my view, of the orderly completion of our work this year.

Senator TORRICELLI. Senator Shelby, I want you to know all members of the minority do not agree that this hearing should not have proceeded.

Chairman SHELBY. Of course not. I know that.

Senator TORRICELLI. I believe it is very unfortunate. And I actually think, as members of the Senate, we owe apologies to those who have come to testify today. I wish this hearing were proceeding.

Chairman SHELBY. We're going to continue the hearing.

The Committee is adjourned.

[Whereupon, at 11:35 a.m., the hearing was adjourned.]

UNCLASSIFIED STATEMENT OF DCI GEORGE J. TENET AS REQUESTED BY THE SSCI

The Central Intelligence Agency did not play a decision-making role in the question of whether or not Wen Ho Lee should be prosecuted. The Agency was asked to look at the potential value to unauthorized recipients of the information FBI said was included on the tapes Wen Ho Lee was alleged to have made, some of which were missing. The Agency did not make any recommendations about how the investigation should proceed or whether or not Wen Ho Lee should be prosecuted.

At a December 4, 1999 meeting at the White House Situation Room, we were asked to summarize the potential value of the information FBI said was included on the tapes. Based on FBI's verbal summary of the tapes, they appeared to contain US nuclear weapon design codes and specific descriptions of the materials and geometry of several nuclear weapon primaries and secondaries. We briefed the attendees that this information would help primarily from a design perspective, providing significant insight and guidance almost equating to a graduate course in nuclear weapons design. But for a country to design, develop, test, and deploy a nuclear weapon, more is required than design codes; for example, a country must possess the requisite fissile material, the fabrication technology to build the device, and the engineering expertise to weaponize the device for delivery. The actual value of the information depends in large part on the capabilities of the country or group that received it. Our analysis included countries with robust nuclear weapons programs; with nuclear weapons programs but little or no testing; with limited or no programs but with high technological capabilities; and without technological capabilities.

Our participation in the meeting was limited to providing a brief summary of the potential value of the information if obtained by others.

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